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FOREWORD.

THIS first number of the *Cambridge Law Journal* appears at a time when there is a marked legal renaissance throughout the civilized world. The vast processes of social, economic, and political change caused by the War have led to the adaptation of old law and the creation of new law: and those processes of evolution are still in progress. This renaissance of law is not unlike, in certain respects, the medieval revival of law within the environment of new departures in the development of the European civilization of those times. In the words of Pascal, *Le droit a ses époques.* The law has, in truth, its epochs of ebb and flow; and the full flow of the law is impelled by the dominant movements of society. These dominant social tendencies not only force the growth of the law, they force also, as a consequence, the growth of legal studies.

The present-day transition to a new period in the history of law and of legal studies has not left the Cambridge Law School unaffected. During the War several of the teachers, and all but a few of the students, were absent from Cambridge engaged in the work of preserving the very fabric of law and justice in the world. The studies of the School were still carried on, but under unprecedented difficulties and beneath the shadow of the great conflict. Like conditions ruled in nearly all the law schools of the world. Suddenly the Armistice changed the situation at Cambridge, and in many another seat of legal education. The return of teachers and students has been accompanied everywhere by an

awakened sense of the vital importance of law and justice in the affairs of nations. Society has likewise come to a fuller realization than ever before of the true function of the lawyer not only in professional practice and in judicature, but also in the manifold activities of private and public life. Men now appreciate more fully the significance of Lord Chief Justice Cockburn's assertion that the lawyer is concerned with "the eternal interests of truth and justice." Men now see that social and political justice, as well as legal justice, are in large measure in the keeping of trained lawyers; and that one of the ways whereby lawyers may, and ought to, fulfil this high trust is by moulding the justice of the law to meet the demands for justice bred of social, economic, and political conditions. The renaissance of legal studies has been the natural out-growth of these broader conceptions of the place of the law and of the lawyer in national and international life.

At Cambridge this new vigour pervading the study of law has already produced results of great value. One of them is the constant co-operation of the teachers in shaping the work of the School along lines of progress—lines of progress consonant with the spirit of the changed conditions and processes of national, imperial, and international life. New courses—including, thanks to the liberality of Gonville and Caius College, a course on Roman-Dutch Law—have been added to the curriculum. Special courses of lectures have been given by lawyers who are not on the permanent teaching staff of the School, notably by Professor Beale, of the Harvard Law School, Professor Garner, of the University of Illinois, Sir Chartres Biron, Chief Stipendiary Magistrate of London, Mr. R. F. Roxburgh, and Dr. C. T. Carr. Methods of study and instruction have been revised and improved. The whole general scheme of legal studies has been subjected to detailed examination with the object of reforming it. New steps have been taken to encourage research in the history and principles of the several legal systems taught at the School. These are some of the proofs of the revival of legal studies at Cambridge as it has affected teaching. They are also evidences of a process of reform in legal education which has not yet reached its full fruition.

Likewise among the students there is noticeable a fresh enthusiasm for law, both as a subject of scientific professional training and as an instrument of justice. A serious devotion to their work characterizes the body of students and meets with a cordial response from those older students, the teachers. Legal studies are pursued not only in the lecture-room and in the

library; they are pursued also in the several law societies within the University. The University Law Society has been reorganized and given a more prominent place in student-life: and round this central society of law students are now grouped, on quasi-federative principles, thirteen vigorous collegiate law societies, all of them, save only one, founded since the Armistice. All of these fourteen students' law societies have certain common purposes; and in the carrying out of these purposes they are assisted not only by the approval, but also by the active support of members of the teaching staff and of distinguished graduates of the School. Among the most important of the common purposes of the societies are the discussion of legal topics and problems; the argument of moot cases; the hearing of papers and addresses by members of the Law Faculty and by prominent members of the Bench, the Bar, and the solicitors' branch of the legal profession; and last, but by no means least, the forming of life friendships through the intercourse incident to meeting and dining together. During the last two years many successful meetings of these societies have been held. The prominent place which the societies now hold in the life of the School is destined to have still further reaching consequences; for plans are maturing whereby the University Law Society may serve as a bond between the Law School and its graduates.

The *Cambridge Law Journal* has been founded within this environment of quickened interest in legal studies. It is itself one of the first of the natural fruits of that interest. Its first number is an appropriate place in which to make a brief statement of the purposes of its founders and the work of its editors.

Let it be observed, first of all, that all save one of the editors of the *Journal* are students of the Cambridge Law School. This fact is worthy of special note, for to all seeming only in the jurisdictions of the Common Law do legal journals edited by students flourish. The success of the *Harvard Law Review* and of similar legal publications edited by students in Common Law jurisdictions outside England is a happy augury for the prosperity of the *Cambridge Law Journal*. The work of legal editorship and authorship is a valuable training; and this work on the *Journal* is already viewed at Cambridge as one of the highest goals of student-ambition. But legal authorship by students of first-rate ability has a wider aspect, for contributions by such men possess a value for older lawyers in their work as teachers or as practitioners.

The editors have divided the *Journal* into four separate departments. Of each one of these a word.

The first department contains some of the addresses delivered and the papers read before the Cambridge Law Club (the legal association of senior members of the University) and the fourteen law societies of students. Thus, the present number contains Lord Justice Scrutton's address on "The Work of the Commercial Courts," Sir Ernest Pollock's address on "The International Court of the League of Nations," Professor Beale's paper on "Equity in America," and Mr. Garrett's paper on "Solicitors' Work and Environment." In addition to papers and addresses, this first department also contains articles on legal topics written especially for the *Journal*. In the present number Mr. Plucknett's article deals with "*Execrabilis* in the Common Pleas."

The second department of the *Journal* is devoted to notes on topics of legal interest, especially notes on recent judicial decisions of special significance. The writing of these notes is almost entirely the work of student editors.

In the third department are to be found the reports of the proceedings of the several law societies in the University, written by the honorary secretaries. One special feature of these reports is that they contain the moot cases which have been argued in the law societies. The publication of these moot cases in the *Journal* will result in the formation of a valuable collection, from which matters for argument at future meetings of the law societies at Cambridge and elsewhere may be drawn.

Reviews of certain of the most important new works dealing with legal subjects are placed in the fourth department.

As thus outlined, the general design of the *Journal* is seen to be somewhat different from that of other legal periodicals in England. This is because the existing conditions of legal study at Cambridge have themselves, by a natural process, dictated both the purpose and the form of the *Journal*. It was felt that the publication of the proceedings of the law societies would be of interest and value to members not only during their student days, but also after their graduation. The desirability of training some of the ablest students of the School in legal editorship and authorship was also felt; and certainly the training which student editors receive on the *Journal* ought to bear its fruits in later years in the enrichment of legal literature. Apart from these purposes of the founders of the *Journal*, there was the further thought that a periodical of this character would enable the Law School to make some contribution to the legal thought of the times. The departments of the *Journal* which contain papers, addresses, articles, notes and book reviews, have been designed with this fundamental purpose in mind.

The appeal of the *Cambridge Law Journal* is thus not alone to the present and former members of the Cambridge Law School. The appeal is also to the teachers and students of law at other schools and to the members of the legal profession generally. The aim of the founders and editors is the production of a legal periodical which shall conform to high standards and which shall deal, so far as possible, with various aspects of each one of the several systems of law taught and enforced in lands under British sovereignty. In this way the *Journal* ought to serve as one of the links of Empire. The hope is also present to the founders and editors that their legal journal may contribute in some measure to the fostering of closer intellectual and personal relations between the law schools and lawyers of England and the law schools and lawyers of America. The heritage of the Common Law in both countries renders such relations natural and desirable.

In his *Second Institute*, Lord Coke declares that "the devil deviseth delays." The writer of this foreword would not willingly place himself within the ambit of Coke's just *dictum*: and, accordingly, he will no longer keep the reader from the perusal of that which followeth.

H. D. Hazeltine.

THE WORK OF THE COMMERCIAL COURTS.[1]

DURING the last Long Vacation—which I am afraid, by the way, *will* be the last *long* vacation—I was just about starting out to indulge in a pastime which a don of the rival, but much inferior, university has described as "putting little balls into little holes with instruments singularly unadapted for the purpose" when a letter was put into my hand with an American stamp and a United States postmark. I opened it hastily and glanced at it, and gathered the impression that some unknown society in the United States was inviting me to proceed there in the month of November to deliver an address on some legal subject. I was flattered and puzzled. I threw the letter on the table and went out to indulge in the aforesaid pastime. It was not till I got home and read the letter carefully that I discovered what it was all about. I gathered that your Downing Professor, who prefers to spend his holiday in a dry climate—a bone-dry climate—was conveying to me the request of the University Law Society that I should come back to my old university and my old college and speak to the law students, and I was very much flattered and grateful. I felt a little, however, like the Prodigal Son, for I thought that for the Cambridge Law Society and the Law School of Cambridge to invite a man who had paid little attention to them while he was up, to come and address them, was heaping coals of fire upon his head.

It is forty-four years since I came up as a freshman to Trinity, and the law school of that day was not what it is now. I have grateful memories of lectures by one Dr. Courtney Stanhope Kenny—who is still with us—and it was one of the proudest moments of my life when I corrected him on a question relating to the income tax. I attended some of the lectures given by the then Regius Professor, which were far too good for me, and I am afraid I did not trouble much with the rest of the Law School of Cambridge of that day. The consequence was that I believe for the last three years I was here I never went to a law lecture. I did worse; I never even went to a coach. Now that I am con-

[1] An address delivered to the University Law Society on November 18, 1920, by Lord Justice Scrutton. It was given orally without notes, and is printed from a shorthand note revised by the speaker.

cerned with education in the Inns of Court, my examiners tell me that their whole life is spent in a continual fight with the coaches. At the rival university, I understand, there is a teacher who will promise you a first class if you will learn the answers to thirty-nine questions. If you will do that, and exercise a moderate amount of intelligence as to which answer you make to which question, the first class is waiting for you. And yet, under these circumstances, and despite the fact of my never having gone near a coach, you ask me to come back. I come back as the Prodigal Son. There is a picture in *Punch* in which, while the Prodigal Son enters through the front door the fatted calf, with an anxious expression, leaps over the back wall; and I have felt that my coming back as the Prodigal Son has disadvantages for someone. However, I am here.

Professor Hazeltine asked me to speak about the Commercial Court, but I propose not to do so. I have an impression that if I proceeded to address you on extremely interesting problems in the higher altitudes of marine insurance law, or some of those extraordinarily fascinating questions of the operation of a cesser clause in a charter-party, I should see this crowded room gradually empty, until only the chairman, who, through courtesy, would be obliged to remain, would be left. And consequently, the less I say about the details of the work in the Commercial Court, the better you will be pleased. But I should like to say something about the way in which the Commercial Court does its work, as illustrating, rather, the problem which must be present in all States, with which all legal institutions must be tested—whether they fulfil the objects which are required in a good legal system.

Now I take it that a good legal system should have four—at least four—attributes. Its judges should be incorruptible and impartial: that is one. The law they administer should be accurate, and founded on recognized principles: that is two. Justice or judgments should be given quickly: that is three. And justice should be accessible to citizens cheaply: and that is four. And if you find a system which combines these four attributes, I think you have got a good legal system.

Now may I say a word or two about each of these questions? First, as to the incorruptibility of the judges. We in England, fortunately, are inclined to treat that as such a matter of course that it is superfluous to mention it; and no doubt it is a tribute to the English law and the English people that this should be so; but it is by no means so in many countries of the world. If you go to some parts of South America you will find that it is

the regular thing for the Judge to receive a present; and the experienced litigant does not waste too much on the Judge of first instance, but waits for the final Court of Appeal and saves his resources. We have a system in England by which a foreigner, coming to sue in England, is required to deposit a sum as security, in case he should leave without paying his costs; and in one case in the Commercial Court an order was given by Mr. Justice Bigham for £100 security for costs. The foreigner was very indignant, and said: "What is this you tell me about your English justice, and the first thing is £100 for the Judge!" And the Judge was very much amused. The fact is that we are so used to the incorruptibility of Judges in England that we do not understand that it may be absent. The other word I used was "impartiality." This is rather difficult to attain in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says: "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class. Even in matters outside trade-unionist cases (to some extent in workmen's compensation cases) it is sometimes difficult to be sure, hard as you have tried, that you have put yourself in a perfectly impartial position between the two litigants. This difficulty does not arise in the Commercial Court. So much for the first head.

Now the second thing that you want in a judicial system is what I may call accuracy in results of fact, settled principles of law upon which you proceed. You will observe that I have said nothing about the results being just, because justice is not what we strive after in the Courts, paradoxical as it may seem. A Judge once told a London cabman to drive to the Courts of Justice. "Where's that, yer honour?" "Why, the Law Courts," the Judge replied. "Ah! now you're talkin', but it's not the same place." We are not trying to do justice, if you mean by justice some moral standard which is not the law of England. The oath which every Judge takes is: "I will do right to all manner of people without fear or favour or prejudice, according

to the laws and customs of this realm." And it is the laws and customs of the realm that the Judges have to administer. Sometimes hard cases make bad law. If once you allow the laws and customs which you have to administer to be diverted by the particular view you take of the particular case, another Judge may think otherwise on the same facts, and there ceases to be any certainty in the law. If the laws and customs you have to administer are wrong, it is for Parliament to put them right—not for the Judges. It is important that the Judges should interpret the settled laws without altering them according to their views of right or wrong in the particular cases. And that is why I have not used the word "justice." There is another difficulty that may arise under that head. You may be so careful to be accurate in fact that you do not decide the fact until everybody concerned is dead, or at least until the plaintiff wishes he were dead, and the defendant wishes he had never been born. You want to be accurate, but not so accurate as to be too long in settling facts and in administering settled laws. That, of course, verges on the third question: that justice ought to be speedy. It is no good talking so long over a case that all the original persons concerned have died, and the lawyers have got all the estate. Your decisions should be given quickly, and, lastly, they should be given cheaply. If you make justice expensive you deny it to the poor man; and the justice of the English Courts should be such that rich or poor should be able to obtain it from the Courts without being ruined. Some of you know the summing-up of Mr. Justice Maule which is supposed to have been responsible for the great alteration of the divorce laws. A man was brought up before him on a charge of bigamy, and the man defended by saying his wife had run away with another man, and he had not been able to afford a divorce. Another woman had come to live with him, and he tried to make an honest woman of her by marrying her. In the most burning sarcasm, not directed to the man but to the system, the Judge told him he was making a great mistake; he should have brought an action for criminal conversation against the other man, and then he should have made an appeal in the House of Lords for an Act of Parliament to annul the marriage: "This, you will tell me, will cost you £600 and you have not 600 pence, but the just law of England makes no distinction between rich and poor." Now it is one of the present dangers of English justice that the ability and energy of counsel and the fertility in suggestion of expert witnesses are making justice too expensive for the poor. There is a case at present going on in the House of

Lords—you have probably seen references to it in the papers—where a colliery tip on a hillside slid down, and two or three thousand pounds' worth of damage was done to the houses below, and another two thousand or so was spent in stopping the colliery refuse from slipping further. An action was brought by the Local Board against the colliery, and when I tell you that it involved the case of *Rylands* v. *Fletcher*, an answering thrill will pass through the heads of all students. At the present moment, in the House of Lords, the costs on both sides are over £150,000. Now if it had been a poor man's house, what justice could he have had with expenses like that? And this is one of the dangers which needs meeting at present in English procedure. It is partly owing to the industry of counsel and partly owing to that particular class of relatives of Ananias to whom I have already referred. It is most extraordinarily expensive to fight any case involving scientific investigation.

Now, how do these requisites apply to the disputes between merchants? You begin, if you look into the history of the laws of England, by finding no disputes between merchants in the law books at all. Nor will you find any such cases in the Year Books. The reason for this is that the merchants of old times—up to the time of Lord Coke—travelled about with their goods in ships, or went to fairs with their goods, and it was no use saying to them: "The next time the King's justices come into this county the Judge will deal with you"; they simply replied that they could not wait. And so all the early disputes between merchants were fought out in special Courts of the merchants at the fairs; or there were local Courts in the seaports. And these Courts gave decisions quickly—the Courts *pie-poudre* gave their decisions while the dust fell from the feet. The Courts in the maritime towns gave justice while the mariners waited for their tide. Now, fortunately, we have got one or two references to these merchants' Courts; for here and there the person who kept the fair was a big ecclesiastic, and when this was the case, very often his monks would keep records of what happened at the fair.

The Selden Society has published a record of cases that were brought up at the fair of St. Ives, a neighbouring town to yours, which was a very big fair and attended by merchants from all over the country. Well, let us see what happened at the fair of St. Ives in 1275.[1]

Thomas of Wells complains of Adam Garsop for that he unjustly detains and deforces from him a coffer which the said Adam sold to him on

[1] Selden Society Publications, II, 138 *et seq.*

Wednesday next after mid-Lent last past for 6d., whereof he paid to the said Adam 2d. and a drink in advance, and on the octave of Easter came and would have paid the rest, but the said Adam would not receive it nor answer for the said coffer, but detained it unconditionally to his damage and dishonour 2s.; and he produces suit.

The said Adam is present and does not defend the customary words of court. Therefore let him make satisfaction to the said Thomas and be in mercy for the unjust detainer; fine 6d.; pledge, his overcoat.

The next defendant was not so fortunate as to have an overcoat.

Reginald Pickard of Stamford came and confessed by his own mouth that he sold to Peter Redhood of London a ring of brass for 5½d., saying that the said ring was of the purest gold and that he and a one-eyed man found it on the last Sunday in the Church of St. Ives near the cross. Therefore it is considered that the said Reginald do make satisfaction to the said Peter for the 5½d. and be in mercy for the trespass; he is poor; pledge, his body.

There are people alive to-day who sell brass rings for gold and painted sparrows for canaries. There is another very complicated case, in which

Nicholas Legg complains of Nicholas of Mildenhall, for that unjustly he impedes him from having, *according to the custom of merchants*, part in a certain ox which Nicholas bought in his presence in the vill of St. Ives on Monday last past to his damage 2s., whereas he was ready to pay half the price, which price was 2s. 6d. And Nicholas defends and says that the law merchant doth well allow that every merchant may participate in a bargain in the butcher's trade if he claim a part thereof at the time of the sale; but to prove that the said Nicholas was not present at the time of the purchase nor claimed a part thereof, he is ready to make law.

Then they went to the proof. In another case it is recited in the abbot's roll:

The case is respited till it shall be more thoroughly discussed by the merchants. And the merchants of the various commonalties being convoked in full court, it is considered . . .

And the discussion goes on.

That is why you will not find commercial cases in the law reports of that time; they were all dealt with by the Courts at the fairs or the Courts in the various seaport towns; they were dealt with as quickly as possible; and by Judges who knew the merchants and knew what they were talking about. This brings us up to the time of Lord Coke. At the time of Lord Coke, a little after 1600, the fairs were dying out, the local Courts were dying out, and the King's Courts were getting more jurisdiction, but still you will find very few reported cases in the *Law Reports*. Why?

For this reason, that the mercantile cases came into the Court not as the law of England but as the custom of merchants, and therefore had to be proved as facts and not administered as law, and there are recorded cases where a man, sued on a bill of exchange for which he was alleged to be liable as a merchant, pleaded in defence that he was not a merchant but a gentleman, and if he was a gentleman the custom of merchants did not apply to him; and so if in each case you proved the custom as a fact, there was no need to report it in the law books, because you were only proving facts.

Now the time when the mercantile cases do begin to get into the Law Courts is when Lord Mansfield becomes Chief Justice, in the eighteenth century. Lord Mansfield set, as one of his principal works, to codify, to make consistent, to state as law, the principles which underlay the custom of merchants. One of the great tributes to him is the tribute by Mr. Justice Buller. He was giving judgment in the case of *Lickbarrow* v. *Mason*, familiar to any of you who are working for an examination. He said: "Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be sorry to find myself under a necessity of differing from Lord Mansfield, who may truly be said to be the founder of the commercial law of this country." Lord Mansfield laid down the principles, and for the sources of the law of merchants he went to nearly every civilized system of law—Scotland, Rome, and the old laws of the sea; from every source Lord Mansfield codified his principles. He wanted also the facts; how did he get them? Lord Campbell has left an account of that: "Lord Mansfield reared a body of special jurymen at Guildhall who were generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in Court, but inviting

them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided. Several of those gentlemen survived when I began to attend Guildhall as a student, and were designated and honoured as 'Lord Mansfield's jurymen.' One in particular I remember, Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself." Lord Mansfield supplying the principles, and the city merchants, whom he trained, so to speak, in the principles, telling him the facts, one got a proper system of commercial law established in this country. It would be administered partly in London, of course, and partly on the circuits, although at the time the towns we now consider important commercial towns were hardly in existence.

While I was at the Bar I was engaged in a heavy arbitration about the building of a warship, in the room at the Admiralty where the old Admiralty Board used to sit in the seventeenth century. Over the fireplace there was a big sort of table of the points of the wind, on a map with a moving weather-cock corresponding to the weather-cock above the Admiralty. The old admirals sitting round the board, and fearing the Dutch fleet coming across, would see, as they sat in council, what the wind was doing. Now Southwold is on that map in large letters, but Liverpool is not there at all. One does not appreciate how recent is the growth of some of our commercial towns.

During the time that followed Lord Mansfield's system the commercial law went on being administered by the Judges of the King's Bench, some of whom had some special familiarity with commercial law, and some of whom had not, but who all complied with the rather strict legal rules of procedure of that time. You picked your skilled counsel as you might pick the University XI., and he set to work to find out which was the correct legal way of expressing the exact legal position. The gentleman on the other side set to work to beat his claim, and so you went on until each side thought its case was in the right form. Then they both went to a Judge, who said they were both wrong and must start over again. This was a good legal system for getting at the right legal result, but it proved distressful to commercial people. It took such a time to get an answer to the question, and when they got the answer it was that they were told to start all over again. The consequence was that a rival judicial system began to be set up in England—the system of arbitration. Commercial men who could not get things settled quickly in the Law Courts

took to going to their own Judges. When an arbitrator decided against a man, the victim tried to upset his judgment in the Law Courts. For some commercial disputes, commercial arbitration acted admirably. Take the innumerable disputes which arise every day where the goods are said not to be up to the contract in quality; now if you went to a Judge who knew nothing about it, and three expert witnesses talked to him on one side and three expert witnesses on the other side contradicted them, the result was you might get any answer from the Judge, whereas, if you went to one merchant who *knew* what he was talking about he would smell the sample, handle it, pull it about, and say "it is a good delivery," or "it is bad." So, for quality arbitrations, the case is obviously more quickly done; the arbitrator generally decides without having the parties before him, just having a sample and a contract note. It was quicker, cheaper, and more accurate, to go to a man who knew something about it, who could generally decide without having the parties before him. With more complicated cases, however, and a commercial arbitrator, you often got the oddest legal results. Impatience with the delay in the Courts, due to attempts to be extremely accurate, which merely resulted in being dilatory, produced side by side with the legal system a very extensive system of arbitration. Most of the commercial work in the Courts was done at the Guildhall sittings, which heard the London disputes. Counsel who were lucky, such as Mr. Justice Mathew, started off from the Temple with a four-wheeled cab full of briefs. Mr. Justice Mathew as a junior would probably be at every case in the six Courts at the Guildhall—all his cases on at the same time; and spending his time wandering from Court to Court supervising his leaders. The fault of the Guildhall was that you did not necessarily get Judges who were acquainted with commerce, and the arbitration system in the City of London therefore increased. At last there came an incident, when I was one of the counsel concerned, which led the commercial community and the Bench to the conclusion that something more must be done. A large sailing-ship, laden with a number of bales of cotton, was coming up the Channel in the winter, and, owing to heavy fog and stormy weather, had not seen land for two days. The captain was getting very anxious, and suddenly, in a momentary clearing, he saw a bright light flash high up on his port bow. He thought at once "Beachy Head." "Port your helm, hard!" He did so, and went off to the south. But instead of Beachy Head, it was the light on Cape Gris-Nez, and the ship went hard on the rocks under the French cliffs. The weather was

rough. They got the bales of cotton out slowly and with considerable expense, because every Frenchman near looked upon this as a benefaction of Providence. They managed to get them on to the beach, and cover them with tarpaulin, and then hauled them up to the cliff. They gradually got them to the railway, and brought them through by railway and the Channel steamers to London. The shipowners then claimed the freight. It was now that the fun with the lawyers began. There is such an institution as "general average," by which, when sacrifice and expenditure are made for the good of the whole cargo, the expenditure is proportioned over the whole cargo, saved and lost, under very strict rules. With the question of how this expenditure was to be spread out over all the cargo, the greatest dispute arose. There were certain people who produced great books of average statements, which stood two feet high, and another person produced a second book which proved the first one all wrong. Then it came into Court. It came before a Judge—a very popular Judge—who had practised in a purely agricultural county, and whose elevation to the Bench was not wholly unconnected with his devoted services to his party, and he had to listen to this case—probably hearing of general average for the first time—for nearly a fortnight; during which the leaders, Mr. Arthur Cohen on one side and Mr. Gorell Barnes on the other, addressed him, and he carefully took down everything they said. And he said at the end: "I will consider my judgment." And three months passed, and he was still considering his judgment; and six months passed, and he was still considering his judgment; and nine months passed, and he was *still* considering his judgment. And counsel timidly took their courage in both hands, and went to ask whether his Lordship would be able to give the results of his consideration shortly. And he said he would. He came into Court, and he said this was a case raising questions of general average. "The first question was—What was the first question, Mr. Cohen?" Mr. Cohen told him what the first question was. He said: "Yes; I agree with the average stater." "And the second question—the second question, Mr. Barnes, what exactly was it?" And so with the third question, he said, "I agree with the average stater; judgment for the plaintiff." The case went to the Court of Appeal, and then to the House of Lords, and they restored the judgment of the Judge below for entirely different reasons. By this time the various business men concerned said: "What is this system you are offering us? Let us have Judges who understand our disputes. We have no desire to bring our cases

on as a means of educating people who have never heard of the matters involved before." The result of this case, coming on the top of some thirty or forty years of struggle, was that on May 24, 1894, an elaborate system of rules for the Commercial Court was set up. It was largely the work of that very great lawyer—even a greater lawyer than he was an advocate—Lord Russell of Killowen; and he got to help him, and to carry out the ideas he had in his head, that very great commercial man, Mr. Justice Mathew. I do not know that anybody considered the latter a great lawyer—I do not think he professed to be himself. He was certainly extraordinarily bad at figures. If he was considering what damages he should give a plaintiff he would put down two and three, add them up as seven, and give the plaintiff nine. But he presided in the Commercial Court giving great satisfaction until he was raised to the Court of Appeal; and for this reason: he was thoroughly acquainted with commercial law and practice; he understood what the case of the plaintiff and of the defendant was from the commercial point of view, and when he gave his judgment each side understood what he was talking about. There have been Judges who have given admirable judgments according to the law, which were perfectly unintelligible to the commercial men concerned. Now, with Mr. Justice Mathew, the parties might think his judgment wrong, but they always understood what he meant, and why he decided as he did. And the system that Lord Russell and Mr. Justice Mathew between them established was this. (You fortunate young men have not yet come across the "White Book." There are gentlemen here who know what that terrible institution is. There are now in the White Book about 2,000 pages of rules and cases, closely printed, which are supposed to settle the practice in ordinary actions.) The founders of the Commercial Court said "Our object shall be this: Get the parties before us the moment the writ is issued. Know what they are fighting about. Let the plaintiff tell us what he says the dispute is, and the defendant what he says the answer is. Without binding ourselves with any rules, make an order suited to that case so as to dispose of it as quickly as possible and as cheaply. Try the case next Monday." That was the sort of line that they adopted in the Commercial Court. I have as counsel issued a writ on the Monday and tried it on the Tuesday, and settled it the same day with perfect satisfaction to both parties. Now you will see at once one fault of the system: it depends on your Judge. Get an inefficient Judge, and the whole system goes wrong; get a Judge who cannot make up his mind quickly, and

the whole system goes wrong. You really want a succession of Mr. Justice Mathews to work it. You want a man who can give his decisions very quickly, and who can make an order fairly. You must not hurry the case too much. It may be that the plaintiff is not so honest as he looks, and keeps documents back; you must not be beaten by that. You must know all the facts. It requires a great many very exceptional qualities in the Judge; it requires great good faith in the solicitors. If you put a counsel or solicitor who is a good defender of prisoners in the Commercial Court, it probably would not work. You want counsel and solicitors who are working with the Judge, to be sure that the dispute between the parties shall be fairly tried. There have been Judges in the Commercial Court—most able men, most popular men—who have not worked the system very well; sometimes they have been too good-natured; to everybody who said "Let us adjourn for a week," they said "Oh, certainly—take a fortnight." Now this does not work. Again, the system does not work very well if your Judge is too conscientious; if he is too anxious to arrive at a right and fair conclusion and, from over-anxiety, takes too long to do it. There have been excellent lawyers who see so many sides of a question that they find it difficult to make up their minds on facts; there was one great lawyer who spent six weeks making up his mind who should pay the costs in a certain case. Now you cannot run life on that scale in business. And so it is one of the faults of the system that, unless you can get Judges like Mr. Justice Mathew to work it, it may break down. Fortunately, we have had a succession of Judges in the Commercial Court who have been able to work it. The present Judge who sits in the Commercial Court, Mr. Justice Bailhache, is carrying on the traditions of the Court with the greatest success and the fullest confidence of all who appear before him. I asked him how long he was taking at present to try his commercial cases, and he said that the average time from the time you went to the Judge to the time the case was heard was two months. Now, in the United States no commercial case is heard under a year. And these quick hearings in our Commercial Court are the things that have struck lawyers over here from the United States. Apparently in the United States they are still in the stage that we used to be in. They are using the old English forms and particulars for delay, freely availed of by defendants who want to be dilatory. There the plaintiff complains that he cannot get a decision, because the Judges, being popularly elected, are tied down by strict rules of procedure. Here the speed is such that the defendant may

howl because the case is decided before he has time to turn round.

Now, that is the system which at present has been introduced to deal with commercial disputes. The Judges are impartial and incorruptible; they decide settled principles of law. It is quick and, unless you pay extravagant fees to counsel, it is cheap. And I think it is one of the most satisfactory systems which has yet been introduced. That is all I desire to say about the work of the Commercial Court.

One thing more I want to say before I sit down. It is a great pleasure to me as an old Cambridge man—an old Trinity man—to come back to speak to the young men who are coming on. I almost tremble to think how many future Judges of the High Court I may be addressing to-night. Indeed, there may now be in front of me one or two Lord High Chancellors. I expect you are thinking, "Well, if this old fogy has got near the top of the judicial tree, surely *I* can get on there": I think you can, and I hope you will—men *or* women. I come from the Middle Temple, which for some reason has been more specially and abundantly favoured by the ladies than any of the others. I think three-quarters of the ladies at present studying for the Bar are at the Middle Temple. We wish them every success. One lady at the last examination got a first class in one subject and a second in another, and her examiners told her she had done extraordinarily good papers—I hope she will keep it up. The ladies must not expect special courtesy at the Bar; they will get, like all barristers, a fair field and no favour, and it will rest with themselves whether they get on or not.

What I want to say to you all—men and women—is this: You are about to enter one of the noblest and one of the most loyal professions in the world. You will hear people—members of the Labour Party particularly—say lawyers are unproductive. It is not true; we are productive of justice. And there can be no nobler task than to take part in the administration of justice in a civilized country. Do not make the mistake of thinking that you are to go into the profession to win for your client by whatever means you can—you must win by justice. You fight with the sword of the warrior, not with the dagger of the assassin. You are all taking part in the administration of justice, and if you succeed in bringing justice you are engaged in providing one of the greatest necessities for any civilized country. May I give you a word of advice? Nearly forty years I have now been at the Bar, and ten years on the Bench. For some fifteen years before I went on the Bench I was earning

nearly double the salary of a Judge, and from my experience I advise you that the first thing you have to do in dealing with a case is to get your facts clearly in order. I heard Lord Russell once say to an amiable advocate who was throwing facts about in wild confusion: "Mr. So and So, can you give me no order? Alphabetical will do if you can give me no other." When you have got your facts in order, you are some way to answering the question; because to grasp the real sequence of events takes you a long way. When you have got your facts in order, do not set to work to see whether case B is more like it, or case C; try next to get hold of the principles, not the facts, of these cases, but the elementary principles they lay down, and apply the elementary principles to the facts that you have got in order.

May I tell you how my dear old master in the law (also a Cambridge man, and especially known at Cambridge because when the Cambridge crew sank at the boat race he was the only one who could not swim; his name was A. L. Smith, and he was commonly known at the Bar as "A. L.") used to put it? You would find him sitting in the pupils' room on the table in his shirt sleeves, and if you went in to him with an armful of books, to consult him about a case, he would say (if the ladies will excuse me), "Damn the books—tell me the facts"; and when you had told him then he would begin to work on the principles, and so get to the result. Then he would say "Have you got anything in your beastly books to beat that?" Try to get your facts in order, and a good grasp of principle. No Judge, nor anyone else, knows anything like the whole details of the law; it is impossible to know all the statutory law, and not very possible to know all the common law. You know where the law is to be found, and if you have a good grasp of principle you can work it out, as applied to your facts.

Now another thing. When you are in Court, remember that you have to keep up the reputation of an English barrister, and that is this: that if you make a statement of fact, the Judge shall be able to rely absolutely on your statement. That does not mean that when you open a case the witnesses will prove what you say—male witnesses are unexpected, and female witnesses are still *more* unexpected. The best thing is to understate the case, and hope the witnesses will prove more than you say. If the Judge says to you: "What was the evidence on this point?" or, "What is in that document?" or asks you any question of the facts that have been proved, you should answer with such accuracy and honesty that he may rely on every word you say. Understand! That is the reputation of a first-class English

barrister—we are a thoroughly honourable profession. When you are dealing with law, do not demean yourself by putting forward a proposition of law you know or suspect to be wrong, because probably the Judge will know it too. And the effect is this—either he thinks that you are an ignorant fellow, which will not do you any good; or he thinks that you think *he* is an ignorant fellow, which will do you still less good. Of course, you cannot always assume that the Judges know all the law. There is a well-known tale, which comes from America, of an advocate in the States who was proceeding to expound at great length the elementary principles of the Law of Contract. At last one of the Judges of the Court of Appeal said: "But Mr. So and So, you must give us credit for knowing *something*." "That was the mistake I made in the Court below, your Honour," he replied. You have to instruct the judges sometimes, but do not, for heaven's sake, instruct them in law which you know to be wrong.

I hope that every man coming to the profession of the law will attain success. But whether you do this or not, so conduct yourselves that you may live up to the present high standard of one of the most honourable professions in England.

T. E. Scrutton.

In reply to a vote of thanks, the Lord Justice said: "The mover of this vote has observed that the fact of having listened to me to-night will help to make him and his fellow-students less nervous when the time comes for them to appear before a Judge for the first time. I assure all young men coming to the Bar that one of the great desires of the whole Bench is to assist them in presenting their cases. Interruptions and contradictions by the Bench become more frequent according to the eminence of the counsel addressing them. But to the young man in a very clean wig (and some of them look very white indeed) and nervous in his first case (and some of them evidently suffer tortures), both the Judges and the senior members of the Bar seek to offer nothing but help. One of my pleasantest memories is that of two letters I received when, after sitting as Commissioner of Assize on the North Eastern Circuit, I was raised to the Bench. They were from young men who had held their first briefs before me as Commissioner, and they wished to thank me for the help I had given them. No young man entering the profession need be in any fear of appearing before the present Bench of Judges."

EQUITY IN AMERICA.[1]

THE first colonists in America might be divided roughly into two streams. Those that went to the North were of the Puritan stripe; those that went to the South were, so far as the ruling class is concerned, Englishmen quite in sympathy with existing affairs, who went only to better themselves. The middle colonies, between New England and Pennsylvania, were not first settled by Englishmen; they require different consideration. The people, then, who settled New England, and to a considerable extent the people who settled Pennsylvania, were not in sympathy with existing conditions in England; and they had as a result of their experience a certain antipathy to the English law as it had been administered. In Massachusetts Bay this antipathy was carried to the extent of forbidding any English lawyer to live in the colony; and they abolished the English law by ordinance, and provided that all matters should be settled by appeal to the Bible, which meant, to them, the Old Testament. That continued for a while, but, of course, it was absolutely an unworkable condition. Men trained in the thoughts of Englishmen could not think like the ancient Jews, and could not really be governed by the law of Moses; and the ordinance rather passed out of their recollection. It was still true, however, that lawyers did not plead in their Courts. The Courts were magistrate Courts, presided over in the highest Court by the persons elected as governor and assistants, in the lower Courts by the lesser magistrates. The law administered—if one can call it law—was simply the whim or the good sense of the magistrate, along with such ordinances as had been passed. The same thing was true of the other New England colonies and—as time passed—was equally true in Pennsylvania.

Meanwhile, towards the end of this period, New York, which had been settled by the Dutch, and New Jersey, which had been settled by the Swedes, not only became English, but became peopled so overwhelmingly by Englishmen that the English law took the place of former laws there; but it was administered largely by laymen, and was not a professional law.

[1] This address was delivered to the Cambridge Law Club on March 3, 1921, by Joseph H. Beale, Royall Professor of Law in Harvard University.

At about the time of the English Revolution colonies came to be more rigorously governed. Most of the old charters were forfeited, and a new provincial form of government was established; and from that time the Judges were appointed, through the royal governors, by the Crown, and they came to be regarded, naturally, as the enemies of popular rights and as creatures of the Crown. The situation at about the time of the American Revolution was that Judges in the North were still regarded as tools of the King and as enemies of the popular will. Even these Judges, during this period, were not trained lawyers; for instance, one of the most prominent of the Judges in Massachusetts was Hutchinson, the historian, who was also governor while he was Judge. By profession he was a merchant, by practice an historian, by appointment a Judge.

At the time, then, of the beginning of the independent life of the States in the North the Judges were very unpopular; the jury was looked on as the representative of the real will of the people, and it became the purpose of statesmanship to throw everything possible into the hands of the jury.[2] This is all, of course, due to the feeling that the jury is the popular body; that the Judge, even although he is elected by the people, is an aristocratic person who is administering a law that is a hampering of the popular will; and that is the reason why the purpose of the statesman will be to limit the power of the Judge and exalt the power of the jury as much as possible.

In the South conditions were very different. The ruling class was well satisfied with the condition of affairs in England, and, although there were popular uprisings in some parts of the South, notably in Virginia and Maryland, the power of the aristocracy on the whole was never shaken. They determined the laws, they had no distrust of Judges, and in those States there was no desire to hamper a Judge or to exalt the jury at his expense. Indeed, one of the most prominent and best loved patriots of Virginia was Judge Wythe, the teacher of Washington and Jefferson.

We should not be surprised, therefore, to find that in the North at least the people were very jealous of giving any jurisdiction to the Court of Equity, there being no jury in that Court.

[2] It is curious how a similar condition of feeling led to similar results later. Even now, although the Judges are all elected by the people throughout the West, the Judges are not allowed control of the Court proceedings. In Missouri, for instance, a Judge can give no charge to the jury except what he is asked to say by one or the other counsel, with this curious consequence: that if counsel does not happen to remember to request him to charge the jury on the most fundamental part of the case, the jury goes out to the jury room knowing nothing whatever about it.

Equity seemed to the people of America, a hundred years ago even, as a non-popular method of applying law, which it was the duty of the people alone to deal with. The Courts administering equity were, so to speak, royalist persons administering the law of an effete monarchy which had never taken foothold in the democratic part of America. The consequence was that in New England there was no equity jurisdiction and very little admixture of equity in the law. The law administered was the strictly legal portion of the law; and the books cited, when they came to cite books, were the reports of the common law Courts. In New York there was a Chancellor from the time of the original constitution; but that Chancellor was not supposed to be a Judge who administered the English system of equity. The Chancellor who mostly moulded the equity of New York, Chancellor Walworth, was a merchant, and when he was appointed he knew no law whatever. This system of affairs was very much like the most striking movement of the present day—a desire to get away from the law of lawyers and get to a law of administrators who are preferably not lawyers: the movement for having everything done by railway commissions and compensation boards. Chancellor Walworth no sooner was appointed than he studied law with great energy, and made himself one of the great lawyers of his time; but he became a lawyer after he became Chancellor.

Pennsylvania never had any Court of equity. The law, however, had more of what they regarded as equitable doctrines in it than the law of Massachusetts—with this result, that the law of Pennsylvania is so curiously mingled with equitable doctrines that it puzzles anyone but a Pennsylvania lawyer. In New Jersey and Delaware, however, and throughout the South, there was set up at the time of our Revolution a separate Court of Chancery, sitting beside the Common Law Court and administering the principles of English equity.

During all this time, however, as I have already said, the Courts, even the Courts of common law, were still largely in the hands of people who had little, if any, knowledge of law. The genius of the people was against specialization. It was the triumph of pure democracy, which believed, as it still believes, than an expert is a dangerous thing, and that the best service is to be got out of the man in the street, who is taken out of the street and put in high places. It is to be remembered that there was no teaching of law except by apprenticeship in the lawyer's office; that the number of barristers was very small in most of

the States; that the decisions of the Courts were reported, before 1820, in only a very few of our States.

The turning point, I think, in the growth of our law was Judge Story's services; first in the Supreme Court, then as a teacher of law and writer of law-books. Judge Story had a vision of the spread of a professional and scientific law which should be the same throughout the States. He wrote the opinion in the important case of *Swift* v. *Tyson*. The Constitution of the United States gave the Federal Courts, sitting within the States, jurisdiction over controversies between citizens of different States. In such a controversy the Court had to determine the validity of the consideration for a contract. The State Courts of New York had taken an unusual position on the point. The Federal Court held, and the Supreme Court of the United States on appeal decided, that Federal Courts, having complete concurrent jurisdiction with the State Courts in such cases, are not bound to accept the decisions of the State Courts on points of ordinary common law—"general commercial law" is its phrase—but are entitled to decide the questions of law according to their own ideas of the principle involved. As soon as the Federal Courts began to carry out the principles of that decision they became a strong influence throughout the country, of course, in favour of establishing a scientific, professional, and uniform law. When Judge Story later began to teach and to write treatises which developed a single body of principle based on decisions from England and from all the States, the movement towards an acceptance of scientific professional principles became very strong.

Now among the subjects which the Constitution provided the Federal Courts should apply, and chiefly among the subjects which Story taught and wrote, was equity. The Federal Courts had jurisdiction in all cases in equity. In some of the older States the Federal Courts were not very much resorted to, but with the newer States they were and are. In the far West, for instance, the majority of cases are brought in the Federal Courts. For equitable relief, especially, the Federal Courts are greatly resorted to. This fact immediately reacted on the feelings of the Bar and of the legislative bodies in those parts of the country which had been averse to equity. Massachusetts gave equity jurisdiction piecemeal, and finally full jurisdiction to its Courts. In almost every other State except Pennsylvania—in all the newer States—equitable jurisdiction has been given to some Court or other.

To what Court has equitable jurisdiction been given? About

1848 we had a very strong democratic movement, as there was in Europe. The result of it was a very strong tendency away from the technical administration of law in the direction of a simpler, more democratic administration. There was a movement, for instance, for the codification of law, chiefly on the ground that if you codify law there would be no need of lawyers—always a very attractive thought to democracy. The lawyers, to be sure, who favoured it did not do so on that ground; they had no illusions about codified law as dispensing with lawyers; but they did feel the call for simplification. On the other hand, many lawyers were opposed to it, and they had a famous controversy in New York—codify or not codify. In the event, all the codifications failed except the code of procedure: that code passed, and New York became the first of what we call the "code States." A principal purpose of this code was to fuse law and equity; and they were fused by swallowing up law in equity. I think that is inevitable. I feel very strongly that in a system which has, separately, law and equity, the doctrines of equity represent the real law, and when a Court of law insists on applying its own views as against the views of equity, it is not getting at the real substantial rights of the parties. So when fusion came in New York, it left the substantive law in accordance with the doctrines of equity. The procedure was largely the legal procedure, but the nomenclature was equitable. For instance, the first pleading is no longer the declaration, it is the statement of claim; the defendant's pleading is the answer, the proceeding in error is the appeal, and so on—the nomenclature of equity being applied to proceedings which are almost entirely legal, except that the technicalities of the common law pleading are abolished. In many other States the example of New York was followed, so that we have America divided into "Code States" and "Common Law States," and the code States probably outnumber the common law States. Most of the West is code, and a considerable part of the South.

In other States the same need for reform was felt, but the remedy adopted was not so thoroughgoing. The new law was drafted more deliberately, and, so far as my judgment goes, it was done with a better result. The chief of these States is Massachusetts. There the subject was considered by a commission, of whom the chairman was B. R. Curtis, who was soon afterwards appointed to the Supreme Court of the United States. His principle was, first, to abolish all technicalities of pleading; second, to abolish all obstacles to the freest kind of amendment during the trial. With those two general principles he drew a

practice Act for Massachusetts, which has been amended very little. The condition in Massachusetts now, and in a number of States which have followed Massachusetts, is this: there is only one Court, and that Court may sit at law or in equity at the same session. They hear cases in law and cases in equity. An action may still be brought at law by what is called a declaration, but this is a simple statement of the facts relied on. The number of actions are reduced to three: actions of contract, actions of replevin, and actions of tort. If the counsel in drawing pleadings feels that he cannot distinguish between them, he can simply state that he is uncertain whether it is contract or tort, and ask that it may be taken as one or the other as the Court may direct. The defendant may plead the general issue, which in practice is called the general denial. He is, by the practice Act, supposed to set up every affirmative defence. He may bring a suit in equity by a bill in the old form, by subpœna, or by an ordinary writ, or he may bring an action stating his case and alleging he does not know whether he is entitled to relief under common law or equity, but he wants all he can get. He may bring a bill in equity and change it to an action at common law. There is no possible chance of a failure of justice by a failure to state a case in due form. That method has worked exceedingly well, and I have never heard of a case being thrown out of Court because of any defect in the pleading or because of any failure of the proofs to substantiate the pleading.

The third form of dealing with the problem is hardly dealing with it at all. It leaves separate Courts of law and of equity, with separate Judges, and one must begin with the right one. This is the case in only a few States—New Jersey, Delaware, Tennessee—I do not at the moment recollect any other States which have separate Courts. In one or two other States, however, they still keep—although law and equity are administered by the same Court—a considerable strictness of pleading. Illinois is a State of this sort, where the pleadings are obliged to conform almost exactly to the old English system of special pleadings.

Now what is the effect of these changes on the problem that we have before us? So far as the code States are concerned it seems to me, who am not a believer in the code practice, to result not in the fusion of law and equity, but in their confusion. They have a way of speaking about that in Ohio. They had a Judge in Cincinnati who really knew a little law, and when the old practitioners used to come before him in Court and talk about the principles of "eequity" he knew what to expect. If they

were simply looking for a general principle that would save them, and they did not much care what, if they said "eequity" he would throw them out. If they said "ēquity," he said "Oh, you mean equity: that is all right." That distinction between "eequity" and "ēquity," while not, so far as I know, taken in words, outside this Judge's Court, is in fact a very necessary principle in the code States, because, there being no means of distinguishing between them, lawyers think that anything that seems to them desirable must be in accordance with the principles of equity. I think I am not exaggerating when I say that I think that this is a perfectly fair statement of the position of the average lawyer towards equity. I do not speak of the lawyer who has been trained in a good law school—the majority of lawyers come to the Bar either from study in offices or from inferior law schools, and they really do think that anything that seems right to their clients is equitable. In the non-code States that cannot be done. Even in the very loose Massachusetts practice, if you begin proceedings in equity you have got to show that the Court of equity should have jurisdiction, and if the Court directs you to argue the question of jurisdiction you cannot say "I will waive that matter and turn this suit into an action of law," because the Court would say, "What is your cause of action?"

In the States which retain separate Courts of law and equity, as in the States which have not fused law and equity but administer the two systems in the same Courts, the principles developed in the English Courts of equity are intelligently and scientifically applied. The New Jersey and the Massachusetts Courts are very sound on all such questions. In the code States of the West, however, there has been a very considerable, though perhaps not unwarranted, extension of equitable jurisdiction. As an example, consider the recent action of the Courts in ordering acts outside the territory over which they have jurisdiction. It is believed to be a settled principle of law that a Court of equity cannot order the doing of an act outside the territory of its Sovereign. In the well-known *Salton Sea Cases* it appeared that a large territory in Southern California and Arizona had been reclaimed by very extensive works consisting of dykes along the Salt River, which flows into Colorado near the Gulf of California. The defendant, by certain works that he had made for irrigation purposes in Mexico, had so dammed back the water in the river that it had broken through the dykes and flooded this reclaimed land. He was caught in California, and an action was brought against him for flooding the land. The defendant

argued that he could not be ordered to do anything in Mexico, and that without changing his works there he could not help flooding the land. The Court's answer was: "We don't care what else you do so long as you do what we order. We don't ask you to do anything in Mexico or anywhere else, but do not put water on this land. That you are doing in this State, and you must cease doing so."

This decision was unfortunately followed by a case in Nevada, which is a very strong code State, with not much business for the lawyers except divorce proceedings. In that case a similar thing had been done in Idaho, and had resulted in the using of an undue amount of water in Idaho and thus withdrawing it from use in Nevada. The Nevada landowners brought an action, and the Court not only granted them an injunction against diverting the water from Nevada, but ordered a periodical inspection of the works in Idaho so as to see that its decree was carried out. That part of the decision, at least, is undoubtedly objectionable, and steps beyonds the bounds of equity. The result is an extension of equity jurisdiction, which seems to exhibit the lack of careful discrimination which comes from lack of knowledge of equity as a separate system.

It is undoubtedly true that lawyers who are practising under the system of fusion are very well satisfied with it. Their feeling is (and it may be the correct feeling) that so long as we are having a good time, why worry?

Perhaps that is the best way to leave it.

Joseph H. Beale.

THE INTERNATIONAL COURT OF THE LEAGUE OF NATIONS.[1]

I HOPE that I shall not either dissatisfy you or disappoint you in what I have got to say to-night, in offering you some observations on the Permanent Court of International Justice, but I confess that it is a pleasure to me to feel that I can cast away all such taints and disadvantages as may attach to a member of the Government, and speak to you as a Trinity man.

In offering to you some remarks about the Court of International Justice, which is the first permanent organization set up by the League of Nations, I want to try to tell you not only what it is, but I also want to say something by way of discussing the question of whether or not it has got any roots which are likely to enable it to grow, and, further, to consider for a short time within what limits it is possible that we can hope for its success.

The origin of this Court is to be found in Article 14 of the Covenant of the League, which we know forms part of the Peace Treaties. It is important that we should examine, or, rather, remember, its terms, because something will turn on the limitations of this article. The article reads as follows:—"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

In pursuance of the terms at the commencement of the article, "the Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice," the Council appointed an Advisory Committee of Jurists consisting of eminent international lawyers and authorities on International Law of various Allied and neutral nationalities for the purpose of preparing a draft scheme for the constitution of the Court. This committee

[1] An address delivered to the Trinity College Law Society on February 18, 1921, by Sir Ernest Pollock, K.C., M.P., Solicitor-General.

met at The Hague in the early part of 1920, and in the course of a few weeks arrived at a unanimous conclusion, which they embodied in the draft scheme which forms the basis of the constitution of the Court now in force. The scheme which they submitted was altered in some important features, but one must pay a tribute to the international lawyers who, in so short a time, found it possible to arrive at a unanimous solution of the problems presented to them. The scheme was then submitted to the Council of the League, and considered by them at their meeting in the summer of 1920 and again at Brussels in October of last year, when some amendments were made and the scheme was finally adopted by the Council. The final draft was submitted to the Assembly of the League at its first meeting, which took place in November, 1920, at Geneva.

Now the Assembly, you must remember, is a true International Parliament in which all the members of the League, great and small, are equally represented, and have equal voting power. If you turn to Article 3 of the Covenant, to which perhaps I may call your attention, it says "The Assembly shall consist of Representatives of the Members of the League. The Assembly shall meet at stated intervals and from time to time as occasion may require. . . . The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world. At meetings of the Assembly each Member of the League shall have one vote and may have not more than three Representatives." By that, therefore, you have a number of representatives to assist each other, and the ultimate result in voting power is that each State which is a member of the League has one vote and no more. The Assembly at Geneva referred this scheme to a committee of its members for examination and report, and this committee, after exhaustive discussion, proposed certain amendents which they embodied in their draft Statute and submitted to the Assembly on December 13, 1920. The Assembly unanimously declared its approval of this draft Statute and passed a resolution in the following terms:—"1. The Assembly unanimously declares its approval of the draft Statute of the Permanent Court of International Justice, as amended by the Assembly, which was prepared by the Council under Article 14 of the Covenant and submitted to the Assembly for its approval. 2. In view of the special wording of Article 14, the Statute of the Court shall be submitted to the Members of the League of Nations for adoption . . . in the form of a Protocol duly ratified and declaring their recognition of this Statute. 3. As soon as this Protocol has been ratified by the

majority of the Members of the League, the Statute of the Court shall come into force and the Court shall be called upon to sit in conformity with the said Statute in all disputes between Members or States which have ratified as well as between the other States to which the Court is open under Article 35 paragraph 2 of the said Statute."

In other words, the terms of the resolution provide that the system of the Court is made available to all members of the League and to others who desire to submit their cases to it. It will be observed that the Statute of the Permanent Court of International Justice, which represents the considered and unanimous opinion of the Assembly, remains to be adopted formally by each separate State. But this is probably now a mere formality, because twenty-seven States have already signed the Protocol, and I take note with pride that the Chancellor of our University has signed it on behalf of the British Empire. I have a facsimile here of the signatures, including that of Arthur James Balfour.

We have thus, in short, got the history of how the Court has been set up under the powers of Article 14; but one asks oneself the question whether a Court of this sort is entirely a new idea or whether its existence is to some extent accounted for by tacit evolution or by the imitative propensity which we so often find in human nature. To me it has been of great interest to find that in history we see previous examples of an effort by nations to try to get rid of their difficulties by the submission of them to arbitration, and it is important to remember—and I shall deal with that a little later on—that at The Hague we have achieved some measure of success in international arbitration. Perhaps it may also be of interest to you to find examples far more ancient than anything we know of in the Hague Tribunals which embody the idea of an International Court of Arbitration—in a rudimentary form, it is true, but which nevertheless embody the idea. In fact, we may say that the present Court is not an isolated phenomenon, but springs from the terrible lessons of war and is the development and extension of earlier experiments in the settlement of international disputes. We may, perhaps, glance at a few of these historical instances as illustrative of what I may call the evolution of the idea and as showing that the present Court may be said to have its roots in an effort of human nature to rid itself of the horrors of war.

Arbitration between States is found amongst, and was practised by, the ancient Greeks. Although I remember this lecture-room years ago, and many professors who lectured to me, I

cannot remember any of them telling me that; and attention was not drawn then—I think I am right in saying—to the point I am dealing with now. In a very interesting paper, to which I can give the reference in the *Solicitors' Journal*,[1] the writer has found some eighty recorded cases of arbitration in classical times dealing with disputes which might have led to war. The forms of arbitration were either "voluntary"—under agreement to submit the dispute to a selected tribunal—or "obligatory"—under a treaty. The arbitrator was in different instances either an individual, a State or city, or an institution, such as the Delphic oracle, the Amphictyonic Council, or the Hellenic Council, formed by Philip of Macedon. In every case, however, the tribunal was created *ad hoc* by the consent of the parties. Sometimes in these cases a mere decision was pronounced; in others, reasoned judgments were delivered. It is worthy of note that in those days there was no sanction of force attached to the decision, and yet there is only one recorded instance of a refusal to carry it out, namely, when Athens refused to comply with the sentence of the Corinthian arbitrators in its dispute with Thebes, and Corinth in this case resorted to arms in order to enforce its decision. Generally, the true sanction seems to have been what it will always primarily be, the fear of public opinion or simply public opinion without the fear.

Passing to a later period, the Middle Ages, you will find frequent instances of recourse to arbitration for the purpose of settling differences between States or Sovereign Princes; *e.g.*, in 1298 Edward I of England and Philip le Bel of France appointed as arbitrators between them Boniface VIII "as man, not as Pope."

We probably should not go to such a tribunal for any political purpose to-day, but it is interesting to see that the experiment was made, though not, I fear, in that instance with very conspicuous success. There is also an example of a treaty providing for permanent arbitration in 1304 between the King of France and the Count of Hainault, but towards the end of the fourteenth century records of arbitration became less frequent, owing partly to the establishment of permanent embassies, and no doubt in great measure to the development of the modern idea of the national State, whose interests are considered as above and outside law. In fact, we get to the point where the development of the idea of the State excluded law, because, at the time I am speaking of, there had been no development in, or, indeed, any

[1] Solicitors' Journal, November 1, 8, 1919.

idea of, International Law; and perhaps it is not until the time of Grotius that we get the beginnings of International Law, afterwards fostered through a long period of time and with somewhat intermittent success. There are, of course, various cases of international arbitration during the succeeding centuries, but I do not propose to detain you by further illustrations, and have merely brought my observations down to this period for the purpose of illustrating what I think is a very interesting fact: that the effort had been made in previous centuries to try to achieve some form of settling disputes which would not involve the agency of war, and that at a time when undoubtedly the idea of war and its horrors as a commonplace of everyday life was much more in every man's mind than it is necessarily to-day.

I now come to the Hague Conferences of 1899 and 1907. The establishment at The Hague of the arbitration system is a very important development; and you will observe that in the Statute of the present Court, under Article 1, "The Permanent Court of International Justice . . . shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907." Hence there is definite recognition in the Statute of the Hague system of arbitration; this is an effort to build upon that system, and I think those who were responsible for framing the Statute have wisely recognized the good work that was done at The Hague, and have sought rather to develop that work than to push it aside or treat it as unimportant and useless. You will remember that the First Convention of 1899 provided two bodies for the settlement of international differences. The first was an International Commission of Enquiry, and the second a "permanent" Court of Arbitration. The Commission of Enquiry was empowered by the terms of its jurisdiction to ascertain facts in dispute and report on them. I think, speaking as an English lawyer, that the idea underlying it was very much the outcome of the training of the continental lawyers, because a "commission pour établir les faits" is one of the first demands made by continental lawyers. I have found it very strongly rooted in the minds of continental lawyers (and they are a very distinguished body of men) that they are impelled to establish a commission of enquiry into a large number of facts for the purpose of sorting and "establishing" them as a preliminary to bringing a case into Court, where we should proceed at once with the trial and deal with the facts there. The Commission under the Hague Convention was to be constituted *ad hoc* between the parties and was to fix its own procedure. The machinery thus

created was used with great success on one occasion—the settlement of the Dogger Bank incident in October, 1904. You will remember that Admiral Rojesvensky, the Russian commander, when passing down the Channel, came upon a number of English fishing-boats, which he thought were Japanese war vessels, and opened fire, with the result that a number of our fishermen were injured. A great outcry arose at the time, and we were very indignant. Lord Lansdowne, who was Foreign Secretary, submitted the matter to a Commission under the Hague Convention, and ultimately the matter was referred to a Commission composed of an English admiral, a Russian admiral, two naval officers chosen by France and the U.S.A., and a fifth officer chosen by Austria. From their conclusion that the attack was unjustifiable the Russian admiral was the only dissentient, and the matter was peacefully settled by the Russian Government paying a sum of money as damages. It is interesting to see that the Commission of Enquiry has on occasions functioned usefully, and it certainly at that time averted the consequences of what was a distinctly ugly dispute: for this country was, for a short time, deeply stirred by the outrage.

A "permanent" Court of Arbitration was also provided by the Convention of 1899. The procedure by which the Judges are chosen in the International Court of Justice is based on the experience gained in setting up the Court of Arbitration under the Convention. By the Convention arbitration was declared suitable in cases of a judicial character, but it was confined, of course, to disputes voluntarily submitted by both parties. The Judges became official Judges, and the machinery created in 1899 was used as a basis for the more elaborate provisions of the Hague Peace Conference in 1907. As finally settled by the Convention of 1907, the Court of Arbitration is declared competent in all cases of arbitration unless the parties fix upon another tribunal; and it is important to notice that the Court is, *ex hypothesi*, purely arbitral, international arbitration being defined in the Convention as "the settlement of disputes between States by Judges of their own choice and on the basis of respect for law," the most suitable subjects for procedure being declared to be the interpretation of treaties, etc. The manner in which this Court was constituted in the absence of special agreement is as follows: each Power adhering to the Convention selects not more than four persons, competent in international law and of high moral character, who are inscribed on a list as members of the Court, and who hold office for six years. When a dispute arises and the Powers involved agree to have recourse to the

Court, they choose the arbitrators from amongst the persons named in the list. In case of inability to agree on the choice of the arbitrators, and, ultimately, of the umpire, elaborate provision is made to safeguard the right of the parties to select their own Judges.

That is in outline the system of the Arbitration Court set up at The Hague, the authority of which is preserved by Article 1 of the Statute of the International Court of Justice. It is interesting to note that the difficulty of choosing Judges was to the fore under that system. To those who were framing the Statute of the International Court of Justice it gave an illustration of the difficulties they would have to meet, and you will see how the new system alters and amplifies the old. But, as I have just suggested, throughout the old arbitration system there has been a jealous care to safeguard the principle of agreement between the parties as to the persons who are to decide each individual dispute; and I think a striking contrast or contradistinction is provided between the arbitration system and the International Court.

The Court of Arbitration at The Hague has done a great and important work, and perhaps subconsciously we have become accustomed to the idea of settling disputes by means of arbitration, which undoubtedly introduces or leads on to the plea that we may find some better method of settling disputes than by the terrible arbitrament of war. It is to the credit of the Hague system that between 1902 and 1914 the Court successfully dealt with fifteen cases, to which seventeen different States were parties, involving violation of territory, delimitation of frontiers, etc. in Europe, in Asia, in Africa, and in North and South America. One of the cases that we shall remember as submitted to it was the dispute which we had with the U.S.A. about the great North Atlantic coast fisheries. That came to a satisfactory conclusion.

Having briefly indicated what was the state of international arbitration when it was determined to try to set up under the League of Nations a Permanent Court of International Justice, I now turn to the Court itself. As I mentioned, the provisions for creating and defining its scope are contained in Article 14. As to the composition of the Court, there are to be fifteen Judges --eleven full Judges and four deputy Judges-- who must be persons of high moral character and either qualified for the highest judicial offices in their own country or of recognized competence in International Law. Moreover, a special direction is given that in electing Judges care should be taken that the whole body

should represent the main forms of civilization and the principal legal systems of the world. You may wonder what the meaning of that phrase is, " the main forms of civilization "—it is partly in contradistinction to " the principal legal systems of the world." The desire was to include the East. I was very apprehensive of the direction to include the East within the ambit of the Court. Those of us who have got our minds fixed as lawyers on the legal systems known in European countries would be unable to accept the legal system of—let us say, China—as quite on the same level as our own, and this phrase is happily, or unhappily, introtroduced as embracing the East. Exactly how that will be interpreted, I leave for those who come after me to define, but that was the intention, and that is why you find what may be called an inclusive phrase. It is purposely left as vague as many matters in diplomacy are.

The election of the Judges is carried out as follows: each State which is a member of the League of Nations nominates not more than four candidates, as in the case of the Hague Tribunal, only two of whom can be of its own nationality, and from this list the Assembly and the Council of the League proceed independently of each other to elect first the Judges and then the deputy Judges. The candidates who obtain an absolute majority both in the Assembly and Council are elected. If the first election does not result in all the seats being filled, a second, and if necessary a third attempt is made. If after the third meetings of the Assembly and Council there still remain vacancies, three members are appointed by each body for the purpose of holding a joint conference and of agreeing, if possible, on one name for each vacancy, and they submit these names to the Assembly and Council for their respective acceptance.

The Council and the Assembly are the two Houses of the League of Nations; and this provision seems to be a method devised, as in many rigid constitutions, for bringing the two Houses together when they cannot agree. But the interesting point is that the importance of getting really good men as Judges, men who will be elected under circumstances which will command the respect of those who come before the Court, has been elaborated with the greatest possible care. An effort has also been made to eliminate the possibility of the selection of a Judge for a particular case in such a way as to give either of the parties who appear before the Court an unfair advantage. It is ensured that the Judges shall be chosen upon a basis which will command both the attention and the respect of those concerned.

The members of the Court are to be elected for nine years and

may be re-elected. The character of the Judge's office is to be contrasted with the temporary nature of a Hague Tribunal. The Court is constituted once for all; and though in one sense, and up to a certain point, the Judges are chosen by the States who come before them, they are not selected *ad hoc* for any particular case or question after it has arisen, but form a real Court always in being. Therefore we get a very marked distinction between a system of arbitration and the Permanent Court of Justice. A Judge of the Court is irremovable unless in the unanimous opinion of his brother Judges he has ceased to fulfil the conditions required for his office. The Court itself elects its President (whose position is of outstanding importance) for a term of three years; he must reside at The Hague, which is the seat of the Court. It is bound to hold one session in every year, beginning on June 15 and continuing as long as is necessary to attend to the business before it. In addition to this the President can summon the Court whenever necessary. Normally the full Court of eleven Judges is required to sit, this number being made up, when Judges cannot be present, by calling upon deputy Judges. For a quorum, however, nine Judges are sufficient.

Now you will see that this is a very stable Court, chosen with great care, a permanent body with a permanent president and a session every year. No doubt these provisions have been made in order to distinguish the Court from the more casual forms of arbitration with which the world has hitherto been familiar.

Labour cases and cases relating to transit and communications are to be considered by special Courts of five Judges sitting with technical assessors. The former class of cases has a special importance, and I shall allude to it again. As to the latter class, perhaps it is worth noting that reference to this Court appears to be contemplated by Article 376 of the Treaty of Versailles, which deals with the settlement of questions relating to rivers, ports, canals and communications. When so many smaller nations or communities have been set up, it is quite obvious that the question of transit and communication may be more difficult than was the case when we had larger States who were able to make their own arrangements for a long stretch of river or railway or canal; and, regard being had to the complicated provisions of the Treaty on this subject, it seems probable that references to the Transit Court will be frequent.

Now we come to one of the most important matters—namely, Jurisdiction: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." The great question of

whether or not jurisdiction should be compulsory has been discussed and written upon by many persons of authority, and many a strenuous effort was made during the discussion of the draft scheme to introduce the right of unilateral arraignment before the Court. To my mind, however, the only satisfactory method is to obtain unanimous agreement to submit disputes to the Court; and Article 14 of the Covenant, to which I called your attention at the beginning of my remarks, excludes any compulsory jurisdiction. It says "This Court shall be competent to hear and determine any dispute of an international character *which the parties thereto submit to it.*" The result is that the Court is to have jurisdiction by agreement, and I am glad that it is so; for if the scheme is to be a success you must not overpress it; you must wait until the general international opinion gives it greater authority and greater power. If you were to ask nations during this period of great unrest, great uneasiness, great anxiety and great apprehension to set up a Court, however noble and orderly, and gave one country the right to hale another country before it, I submit you would break up the whole system. If you were to ask for this you would lose the sanction of public opinion.

The class of cases which *can* be brought before the Court are unlimited and unrestricted, and if you turn to Article 13 of the Covenant of the League you will observe that members of the League agree that "whenever disputes arise which cannot be settled by diplomacy, they will submit the whole subject-matter to arbitration." Whether it is intended to define the jurisdiction of the Court in Article 13, I do not know; but as a practical question, I think that, once having got the Court, they will make use of it for that very purpose. As confidence in the Court is increasingly established, it may be anticipated that it will naturally come to be *the* tribunal selected in every instance, and there is thus a good prospect of a very considerable number of cases being brought before it. But apart from this there are a number of provisions in the various treaties which we have made which imply a compulsory reference of certain matters. Let me give you an illustration. Perhaps I may remind you of the Labour questions under certain clauses of the Treaty of Versailles. It is there laid down that questions arising out of the refusal by a State to accept recommendations of the Labour Organization of the League of Nations shall be submitted to the Court for final decision. When the scope of the recommendations referred to are borne in mind, you will appreciate the importance of this branch of the Court's powers. Again, in the

Treaties made with the Balkan States will be found instances of "compulsory" jurisdiction, *e.g.*, under Articles 9, 10 and 11 of the Treaty between the Allies and Roumania, she has agreed to give freedom in religious, racial and linguistic matters to all minorities; and under Article 12 of the same treaty it is definitely provided that any question of law or fact arising out of those articles shall be referred to the Court on the demand of any Power which is a member of the Council of the League. It therefore appears that the Court is not set up merely to deal with cases brought before it by an agreement to refer the particular case; there are a number of cases which by virtue of a continuing obligation *must* be brought before it.

The next most important question is: what is the law to be administered by the Court? In England, with our very elastic Common Law, the growth of centuries, which gives us a freedom almost unknown in continental countries where codes prevail, we are accustomed not to require a very definite or precise catalogue of the system which is to be made use of before the Courts. It is otherwise abroad; they are so accustomed to look for their law to codes that they require something like a code to follow, and a very great difficulty must have been felt by those who framed the Statute in defining what law the Court should administer. It has now been decided that the Court should apply: (1) International Conventions, establishing rules recognized by the contesting States. (2) International custom as evidence of a general practice accepted as law. (3) The general principles of law recognized by civilized nations. (4) Judicial decisions and the teaching of international lawyers as subsidiary means for the determination of the rules of law. That is perhaps a very indefinite and wide catalogue. It includes very many of the sources from which we draw the law administered in the one International Court of Law that we know at the present day, namely, the Prize Court; and on the whole the probability is that the discretion of the drafters has been well exercised in the catalogue given. If, however, the parties so agree, the Court may decide a case *ex aequo et bono*. Now, generally, I do not hesitate to say that these words give me some trouble from the point of view of definition. I think the words have been thrown in by contrast; where you find that all the recorded conventions and cases fail, then you may turn to what is after all the enlightened man's reference—common sense. Others will differently interpret this wide and embracing phrase, but we will leave it at that. Generally the catalogue that I have described marks a very decided step towards a true international Court as

distinguished from a mere arbitration tribunal. It is intended to deal with and satisfy the demands of to-day.

As to the remainder of the Statute which deals with procedure, I do not want to detain you. The Judges of the nationality of the contesting States keep their positions in the Court, and special provision is made for the appointment of a Judge of such nationality if there does not happen to be one already a member. The languages to be used, unless otherwise agreed, are French and English. The parties may be represented. The oral and written proceedings are very much on the model of an ordinary Court. Provision is made for a single reasoned judgment, but the dissenting minority are allowed to deliver their opinions. The judgment has no *binding* force except between the parties and in the particular case in question, but this does not affect its force as a precedent within the limitation of the article which I have referred to as defining the law to be applied by the Court.

Finally there is a sanction, a definite sanction of force. If you refer to Article 13 of the Covenant you will read, "In the event of any failure to carry out an award, the Council shall propose what steps should be taken to give effect thereto." In the last resort, such steps would imply armed invasion, but no doubt economic blockade is intended as being the most pacific and most potent of the weapons available. When you realize what was the effect of it in the last war; when you read the tribute paid to it by the German writers on the war, you see what an immense effect that will have, and you can appreciate how powerful that weapon can be made without recourse to arms.

I will not make further reference to Article 13, which is inherently difficult to interpret; but perhaps I may conclude by summarizing the new features of the Court. Note first its permanence and the determinate character of the Judges and judgments; secondly its suitability to deal with cases of all kinds, though only such as are submitted to it by agreement (whether by previous treaty or as the dispute arises); next, its power of advisory jurisdiction, under Article 14 of the Covenant, which may acquire a far-reaching importance; fourthly, its administration of international law and its potentiality for developing a definite system of law by means of its decisions. Finally, you ought to observe that it is not without some sanction; and although the absence of compulsory jurisdiction is the criticism that is made upon it, for the reasons which I have given you I welcome that fact. I believe that if this Court is to serve the purpose which we hope it will serve, it must be by steady advance towards acceptance of, rather than by insist-

ence upon, a jurisdiction to which the world is not accustomed, and which has never yet been exercised on a large scale in international spheres.

May we not as lawyers regard the establishment of an International Court of Justice as a great advance in the science which we pursue? It certainly inspires hopes. Whether it will eliminate war is a question which only the future can answer, but in these times, so full of international difficulties of greater or less importance, we may all heave a sigh of relief if *some* system of justice is established which shall gradually—I do not say immediately—command the attention and the respect of nations and which may offer an alternative solution to the horrors of arbitrament by battle. We can indeed draw some hope from one or two facts which we may observe at the present time. I think we may say that law is the greatest bond that we have with the United States of America. It is always interesting to me that when we meet lawyers from across the Atlantic we are immediately found in close concert together; and it is no mean thing to say that we have the same titles in the law on both sides of the Atlantic. We may regard the bond between us and the great English-speaking race on the other side as the root and foundation of peace at all times, and if we can lay the same foundation between ourselves and other nations we shall have done a great deal for the peace of the world. Law is, after all, the training which leads men away from mere conflict. As Lord Macaulay wrote to the glory of England, "she has much to boast of, in her triumphs on sea and land; but she has a still higher claim . . . her mightiest empire is that of her morals, her language and her laws."

When I think what a widespread force English justice and English laws have been throughout the world, I welcome the thought that an International Court has been founded which may lay between a number of other nations the basis and foundation of friendship. We may take comfort and hope that in founding a system on law we have founded it on a real foundation. Its beginnings may be small; we must not force the pace too quickly. But we may hope that a beginning has been made which will ultimately lead to wars ceasing throughout the world.

ERNEST POLLOCK.

SOLICITORS' WORK AND ENVIRONMENT.[1]

THE Committee of the Cambridge University Law Society, when they honoured me with the invitation to address the society, had doubtless the expectation that a solicitor who had been in practice for between forty and fifty years might from his experience be able to explain the work and environment of the profession in a way which might be useful to those members of the society who, having determined to follow the legal profession, had not yet decided to which branch of that profession they should devote their lives. I will endeavour to fulfil that expectation. I will draw for you the picture of a solicitor's professional life and work and surroundings with such accuracy as my powers and the time at my disposal permit, not concealing its blemishes or exaggerating its merits. I hope that I shall be able to make you see the picture right. If so, you will, when I have finished, agree with me that though the highest honours and emoluments of the legal profession are not at present open to solicitors, yet theirs is a calling which renders to the community an important—indeed, an essential—service, and one to which a man of ability, and still more of character, may devote himself with confidence as affording ample scope for his energy and ambition. I claim for the profession that, properly practised, it can and does do nothing but good. Unless I were prepared to make that claim after forty-seven years' experience in the profession, I should not be here. I resent the representations by popular novelists and dramatists of the solicitor as a costs-pursuing pettifogger, if nothing worse. Dickens heads the tribe of libellers with representations which, even as caricatures, are grossly overdrawn. In his celebrated preface and first chapter of "Bleak House" he discloses his motive, which was the laudable one of the correction of abuses of legal procedure. At the time he was writing (the middle of the nineteenth century) those abuses no doubt prevailed. But I hope I need not assure my present audience that Messrs. Kenge and Carboy, Mr. Tulkingherne, Messrs. Spenlow and Jorkins, Messrs. Dodson and Fogg, and all the rest, however entertaining in works of fiction,

[1] This paper was read to the University Law Society on December 2, 1920, by Mr. S. Garrett, ex-President of the Law Society, London.

are nothing more or less than fanciful romance. They are true to nothing in real life that I have ever seen. They are no more faithful representations of solicitors than "the young man of the name of Guppy" is a faithful representation of solicitors' clerks. In his preface to "Bleak House" Dickens says that he has purposely dwelt on the romantic side of familiar things. In the chapter entitled "Attorney and Client" he writes:—

> "The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity is apt to think it. Let them but once clearly perceive that the grand principle is to make business for itself at their expense and surely they will cease to grumble."

The romantic side of familiar things! If he had said that his theme was the familiar side of popular ignorance and prejudice he would have been nearer the truth. This ignorance and prejudice he did his best to inflame, not without success. If a tithe of what he wrote on the subject were true no man of honour could follow the profession of the law or encourage younger men to do so. It is certainly a misfortune for the profession that a man of genius, whose writings have dominated a section of the reading public for three generations, should have so persistently held up the profession to odium and ridicule. One derives some consolation, however, from the reflection that Dickens brought up one of his sons to the law, and that that son has attained a prominent and honourable position in the profession which his father habitually calumniated.

Therefore, if any of you are admirers of Dickens (as I am), do not be discouraged by the picture of the law and of lawyers which he draws. Reflect that it is only the romantic—that is, the fanciful—side of familiar things. I hope that the account which I shall now give you of my own branch of the profession will satisfy you that Dickens's picture is fanciful to the point of falsity.

The first thing which a man should understand before he enters a profession is its organization. In the law everyone is familiar with the fact that there are in this country two branches, as they are called, of the profession—the Bar and Solicitors. It is convenient to call them "branches" of the profession, and I shall myself use the expression, but the expression, though convenient, is inaccurate. The word "branch" imports a common stem, or, at any rate, a common root, from

which all the branches spring. In this sense barristers and solicitors are not branches of one profession. They are two distinct professions, working in water-tight compartments, distinct in their origin, in their history, in their education, and in their work. Whether it is desirable in the public interest that this complete and radical division should continue, is a question which has often been discussed, and which will be more discussed in the future. But I am dealing to-night more with what is than with what ought to be, and I shall not enter upon a discussion of this subject further than to say that in my view, while the work of a solicitor is not only different from that of the barrister but is in its nature in some respects inconsistent with the temperament and character of the effective advocate, yet both branches would benefit by a greater community in education and intercourse than prevails at present. In education it seems an absurd waste of power that there should exist two establishments for legal education, one in Chancery Lane for the education of students who propose to become solicitors, and another about one hundred yards distant, in Lincoln's Inn, for the education of students for the Bar, where the same subjects are taught by teachers of the same class to students of the same class. Surely great economy of time and labour and money would be effected by an amalgamation of these two educational establishments. Further, it seems to me that nothing but good would result from the two sets of students rubbing shoulders with each other in the class-room and the examination-hall. In their subsequent professional career the two will have dealings with each other, and the difficulties which, human nature being what it is, will from time to time arise would be treated on both sides with more sympathy and consideration if the parties had received their legal education together in the same class-room.

The subject of the legal education of solicitors brings me to the consideration of the position and functions of the Law Society. The Society bulks large in the professional life of all solicitors, though all solicitors are not members of it. Membership is entirely voluntary at present. There are about 14,000 practising solicitors in England and Wales. About 9,000 of them are members of the Law Society. But in addition to *The* Law Society there are provincial law societies in all the principal centres of population, such as Liverpool, Manchester, Birmingham, Newcastle, Bristol, Yorkshire, etc. These provincial societies are united to each other in an Association of Provincial Law Societies, and both the association and the separate societies are in close touch with the central society in London. Thus the

central society in conjunction with the provincial societies does in fact represent in substance the whole profession.

Great ignorance prevails among the laity as to the objects and powers of the Law Society, and a few words on the subject may be useful. That Society was founded in the year 1825 by members of an older society called "The Society of Gentlemen Practisers in the Courts of Law and Equity." The object of the earlier society was to take into consideration "matters relating to the benefit of suitors and the honour of the profession." The society was founded in 1739. About that time (the exact date is obscure) the Inns of Court, as we now know them, succeeded in excluding from membership all solicitors, who thereafter betook themselves to the so-called Inns of Chancery (New Inn, Clement's Inn, Sergeants' Inn, Thavie's Inn, and Barnard's Inn and others). By this means was established, not a division of functions, which had existed from a much earlier period, but a division of education and discipline which was not part of the original system, and which, in my opinion, as indicated above, might now well be abrogated in large measure with advantage to both branches of the profession. There is a tradition that each Inn of Chancery was affiliated to one of the Inns of Court, and that tradition has been recognized as lately as 1901, when a large sum of money arising from the sale of New Inn was, by order of Court, divided between the Law Society and the Inns of Court for the promotion of the professional education of solicitors and barristers respectively.

The Inns of Chancery soon became mere social and dining clubs, and ceased to fulfil the useful purposes for which they were designed. Then it was that the Society of Gentlemen Practisers, above referred to, was formed. For nearly a century solicitors were entirely dependent upon that society for the protection of their honour and just interests. But there is no record of its having undertaken any educational functions, and in that respect it failed to make good the default of the Inns of Chancery. The Law Society was accordingly formed not only to carry on the useful work of the Society of Gentlemen Practisers but also to re-establish and carry on the educational work of the Inns of Chancery, which had been allowed to lapse. Having been formed as an unincorporated body in 1825, it was incorporated by Royal Charter in 1831, and the charter was reaffirmed in 1845. The charter stated that the general purposes of the Society were "to promote professional improvement and facilitate the acquisition of legal knowledge."

The Society first made its mark as a public body of importance

in the year 1843, when the Solicitors Act, 1843, was passed, which is still law and which consolidates and amends previous Acts and appoints the Law Society as registrar of solicitors. Hence it comes that the first thing which an articled clerk does is to register his articles of clerkship with the Law Society. So commences his connection with the Society, which continues throughout his career to dominate and control and, if necessary, to correct his professional actions.

The functions of the Society are both private and public. In its private capacity it provides for its members a hall and public rooms, a first-class legal library, a restaurant, and the usual amenities of a club. It is also a very powerful trade union. By its own members and by the members of provincial law societies associated with it, it can exert great influence on legislation in any matter affecting the professional interests of solicitors. That influence, it can be fairly claimed, has been used for the public good. Many of the law reforms of recent years have originated with the Law Society, such, for instance, as the Settled Land Acts. At the present moment it is working hard in assisting the Government to improve and to pass the Law of Property Bill now before Parliament, which is founded, except on one very controversial point, viz., compulsory registration of title, on principles which have long been advocated by the Society.

I claim for the Society that it takes no narrow view of the professional interests of its members. It is governed by a Council of forty of the leading men in the profession elected by popular vote of the members. The Council is fully impressed with the truth that where professional interest and the public interest conflict the former must yield, and it is by the recognition of that fact that the Society maintains its just influence both with the public and with the profession.

The public functions of the Society have been vastly extended since 1843. It is now not only the registrar of solicitors, but by statutory authority it examines them and, if necessary, disciplines them. It has from its earliest days educated them by providing classes and lectures for students, and in the year 1903 a School of Law was established by the Society, with a distinguished jurist, Mr. Edward Jenks, as principal, in which all articled clerks in London can, if they so please, receive a complete legal education at very moderate cost, and those in the country can be very substantially assisted in their education not only by lectures and classes provided by the provincial law societies with the help of money grants made to them by the central society, but also by correspondence with the teaching

staff of the Society's school. The scheme is controlled by a committee appointed by the Council, consisting of a majority of representatives of that body and of representatives of the provincial societies and of two nominees of the students' societies.

This is the scheme of legal education which it has been suggested should be amalgamated with the Council of Legal Education, which controls the education of Bar students. Whether that amalgamation takes place or not, the Law Society will, of course, retain control of its own students, and will remain the great legal educator of the country. I have not the exact numbers, but I should expect to find that the students educated by the Law Society outnumber those educated by the Council of Legal Education by three or four to one.

An amalgamation such as suggested between the Council of Legal Education and the Law Society's School of Law would, as I hope and expect, be the first step towards the establishment of a national or even an imperial school of law, the want of which is a standing reproach. An amalgamated body representing the educational authorities of both branches of the profession would approach the Government and Parliament with proposals for the establishment of a national or imperial school with much greater driving force behind it than would be at the disposal of the separate existing bodies. But I must not pursue this theme, which would lead me away from the proper subject of this address, though I could not resist the temptation of saying these few words on the subject to my present audience, to whom the matter cannot fail to be of great interest.

Having registered his articles with the Law Society, the articled clerk, if he is wise, will enter himself to attend some of the classes and lectures under the Society's educational scheme. If he is graduated in law at this or another university, he is excused from the examination in elementary law known as the intermediate examination, but he has to pass the final examination at the end of his articles as a condition of being admitted on the Roll of Solicitors. The examination system of the Law Society has been criticised lately by a distinguished member of the Society, and I am not here to say that it is perfect. I happen at the moment to be chairman of the committee of the Council which controls the examinations. In my opinion the examinations at present afford too much scope for that arch-enemy of all examiners—the crammer. I hope it will be possible to do something to defeat that gentleman and to induce students, instead of resorting to him, to attend the classes and lectures

provided by the Society, which afford a far sounder legal education.

Next, perhaps the most important public function performed by the Society is that of discipline. Every student will hope not to come under the Society's disciplinary lash himself, but he will soon learn in the course of his professional career that among 14,000 practitioners there are some for whom that same lash is a very useful and, indeed, necessary instrument. For thirty-two years past, under an Act passed in 1888, all complaints against solicitors have been heard before a committee of the Council appointed by the Master of the Rolls, but the committee had only power to report to the Court the facts and their view of the conduct of the solicitor. The Court alone had power to pronounce sentence upon the facts so found and to punish the solicitor by suspension from practice, or by striking him off the Roll. By an Act passed in 1919, however, the Law Society has power, through its committee, not merely to enquire into the facts but to act upon their finding by suspending the solicitor, or striking him off the Roll, subject to an appeal to the Court. The profession, therefore, now has the power which every other profession has of cleansing its ranks of unworthy members and punishing those who are guilty of misconduct not sufficiently heinous to deserve permanent expulsion from the ranks of the profession. Nothing less was due to the dignity of the profession.

I wonder what Dickens would have said to this. Most of the solicitors depicted in his novels would in these days have found themselves before the Discipline Committee of the Law Society.

Besides the functions I have mentioned, the Law Society performs a number of other services to the profession. The Council, through a committee, frequently acts as mediator in differences which arise in the course of practice between solicitors on questions of costs and otherwise and as adviser to members on such questions. Another committee deals with questions of legal procedure, and is constantly in communication with the Lord Chancellor with a view to simplifying and improving the procedure of the High Court. Another committee does the same work with reference to the County Courts. Another committee watches the proceedings of Parliament, and takes action when any question of interest to the profession arises in Parliament.

It will be seen, therefore, that the activities of the Society are very various and cover a large field. From the time when a man as an articled clerk registers his articles with the Society to the day when he retires from the profession with, it is to be hoped,

an adequate competency and applies to have his name taken off the Roll of Solicitors the Law Society is always with him. It educates him, examines him, advises him, admonishes him and, if necessary, disciplines him, and is constantly watching and protecting his interests. I think it may be fairly claimed that the Law Society is the most effective professional society in the country, and it is well that those who are about to enter the profession should bear in mind how largely the Society will enter into their professional life and what services the Society renders to the profession.

I have spoken hitherto entirely of the work and surroundings of a solicitor outside his office. I will now say something about his work inside his office. I remember an expression of Macaulay, which has always remained with me since I first thought of becoming a solicitor. In speaking of some political character (I forget whom), Macaulay said, "His affairs were as multifarious as those of an attorney." How multifarious the affairs of a solicitor are may be realized by the following list of the branches of everyday practice for which provision has to be made in his office, and on which he may be called on at any moment to advise:—

Conveyancing.
Common Law.
Equity.
Bankruptcy.
Company Law.
Probate.
Divorce.
Admiralty.
Criminal Law.

To these during the last six years must be added the emergency legislation arising out of the war and the Defence of the Realm regulations, and at all times must be added the general advice which is constantly being called for from a solicitor on domestic and private matters, involving often questions of morals as much as questions of law. When it is remembered what volumes have been written on each of the branches of law enumerated above, and what varieties of questions may arise in each, and that a solicitor must be not only a lawyer but a man of business, it will be realized how well justified was Macaulay in calling our business "multifarious."

Solicitors as lawyers are at this disadvantage as compared with the Bar, that they do not, as a rule, specialize. I say "as a rule," because there is now a certain amount of specialization, and it has increased of recent years. There are firms of solicitors who have gained a reputation as patent lawyers; others as experts in commercial law with its various sub-divisions—shipping, insurance, stock-exchange business, Parliamentary work,

etc.; others in divorce and criminal law, and so on. But this specialization is exceptional, and is practically confined to London and a few other large centres of population. With the Bar, on the other hand, it is exceptional not to specialize. Apart from the broad distinction between the Common Law Bar and the Chancery Bar, between which a man makes his choice at the beginning of his career, there are numerous sub-divisions in each of these branches of business in which specialization is the rule and not the exception. At the Bar the men who best succeed are those who by chance or by choice have specialized in one of the various branches, such as Commercial Law, Admiralty, Probate, Divorce, Criminal Law and Local Government work. The specialist in either branch of the profession acquires a profound knowledge of his special subject and greater confidence in dealing with it than the general practitioner. But at the Bar the specialists form the majority, while with the solicitors the specialist is the exception. The specialist solicitor is able to do without the assistance of counsel a good deal of the work connected with his special subject for which the general practitioner without any special knowledge would resort to the specialist barrister. For instance, in the City of London to-day a large number of commercial arbitrations are held, and important questions are decided of which the Bar hears nothing. The parties are usually represented before the arbitrators by their solicitors, who have specialized in commercial law and who are quite capable of conducting their clients' cases before arbitrators without counsel. Solicitors have no right of audience in the High Court, and therefore in cases which go before the Court counsel are necessarily engaged. But for every commercial dispute decided in the Courts to-day there are probably ten decided by arbitrators, and in the majority of these in the City counsel are not employed.

It has been matter of complaint with some solicitors that they have not right of audience in the High Court as they have in the County Courts and other inferior tribunals and before arbitrators. I do not sympathize with the complaint. I do not see how a solicitor's business could be carried on if he were liable to be detained personally in Court for a whole day, or for days at a time, in conducting his cases. Arbitrations are quite different. They are fixed at hours convenient to the parties after consultation with them. No such facilities are possible for Court work. If solicitors had right of audience in the High Court, it would inevitably lead to fusion of the two branches of the profession, and this, in my opinion, would not be for the public benefit,

though, as I have already said, greater unity in the education and training of the whole profession, each branch maintaining its separate functions, but with free right of passage from one branch to the other, would facilitate the conduct of business and would remove whatever force the agitation in favour of fusion now has behind it. It is obvious that no ordinary man, be he barrister or solicitor, can be really expert in all the law comprised under the nine heads which I have enumerated above, in the sense of being prepared to advise upon them without preparation at a moment's notice. Such questions may be, and constantly are, sprung upon a solicitor in such circumstances. Probably four out of five of them are easy of solution, such as any well-trained lawyer of either branch can deal with at once without difficulty. But the fifth may be a "poser," as to which, unless it relates to a question in which the solicitor has had special experience, he is bound in justice to his client and himself to resort to counsel for advice, and the counsel selected would, of course, be one who has made a speciality of the subject in question.

Even in matters of practice the solicitor needs the assistance of experts in each branch of the law. Common Law practice, Chancery practice, Probate practice, Divorce practice, Admiralty practice, Bankruptcy practice, all differ in various details, and the solicitor in large and varied practice provides himself with a staff of whom the heads are specially experienced in the practice of one or more of the different branches of business. If any of my audience should hereafter as an articled clerk enter the office of a firm of solicitors with considerable practice he will probably find it organized into different departments, each presided over by a managing clerk (usually an unadmitted man) with one or two or more assistants under him. A common organization of such an office would be to have

(1) A Common Law department.
(2) A Chancery department.
(3) A Conveyancing department.
(4) A Cashier's and book-keeping department.
(5) A Costs department.
(6) A Copying and Clerical department.

The organization would, of course, vary largely with the particular practice of the firm. For instance, a firm with a large Admiralty practice would have a special department for that work. Work which does not fall under any of the heads designated by the titles of the departments and which is not extensive enough to require a department by itself would be assigned to

one or other of the other departments according to circumstances. Admiralty and divorce and bankruptcy work would generally go to the Common Law department, probate work and the administration of estates to the Chancery department, and the preparation of agreements and such documents to the Conveyancing department.

You will understand from what I have said how dependent a solicitor is upon the honesty and efficiency of his clerks. Not only the financial results of his business, but his peace of mind and his reputation are largely in the hands of his clerks. Without efficient and honest clerks his business could not be carried on. The work which a solicitor can do himself would usually not pay the rent of his office, much less provide for the maintenance of himself and his family. I should like to say a few words about this class of men, who thus bulk so large in a solicitor's life. Solicitors' clerks are a hard-working and capable set of men, doing in the higher grades responsible and highly important work for a remuneration which is certainly not excessive. Dickens was in early life a solicitor's clerk, but I gather that he never reached a high grade in the profession. Whether he was unfortunate enough to come across the prototype of "the young man of the name of Guppy," I do not know. All I can say is that in the course of my professional life I have known many hundreds of solicitors' clerks, and I have not, I am glad to say, come across one whose character in the slightest degree resembled Guppy's or justifies the representation of that individual as a type of his class.

Let me sketch a typical day's work of a managing clerk in a considerable solicitor's office. Reaching the office, say, at 9.30, he has to see each of his principals for whom he has cases or work in hand, receive their directions on such cases or work, and see the letters arriving by the morning post relating to them. Then he has to go up to Judge's Chambers to attend summonses on interlocutory applications relating to his case; then he may have to attend a taxation of costs. This probably occupies him till lunch time. After lunch he returns to the office and probably has to see witnesses in some pending case and take their "proofs"; that is, the statements of the evidence which they are prepared to give. This is very important work, for many a case has been lost through the proofs of the witnesses placed in counsel's hands when the case comes to trial being an inaccurate representation of what the witness is prepared to swear to. Nothing is more damning to a case than for counsel to get an answer from his witness obviously different from what the wit-

ness was expected to say. The taking of proofs may, therefore, last an hour or two, even with the assistance of a shorthand writer. After that is done the clerk has to write his letters for the day, a work probably of another hour or two, and then, lastly and most important of all, he has to enter in his diary a complete record of all that he has done during the day; for it is from such a record that the professional charges of his firm are made up.

This is a typical day's work, but, of course, it may be varied indefinitely. For instance, if a case is on for trial and the case is not one demanding the presence of a principal, the managing clerk in charge of it or one of his assistants must be in Court while the case is proceeding and be ready to produce the papers required and to give counsel instructions on any point which may arise. In that case the clerk's office work for the day must be squeezed into the short time between 9.30 and 10.15 in the morning and between 4.15 and 6 or 7 or 8 o'clock in the evening. If this lasts for several days continuously, the strain upon the clerk is considerable and trying.

The master, of course, is responsible to the client for the efficiency of the clerk's work. The master's work very largely consists in seeing the clients and taking their instructions and supervising and directing his clerk's work to give effect to those instructions. Though the clerk does not initiate, he is the instrument by which the work is done, and the success of the business very largely depends upon the efficiency of the managing clerks in the performance of their duties.

The clerks are usually drawn from the lower middle class. They enter the office as boys in a humble capacity, and they gradually rise according to the ability, zeal and discretion which they display. Sometimes, in cases of special ability, they get their articles given to them by their master—that is, the master pays the stamp of £80 on the articles—and thus they become solicitors. These cases are not common, and the cases in which marked success follows the change of occupation are very uncommon. I know of one case in which I anticipate considerable success on the part of a clerk who has had his articles given to him, and another case in which considerable success has been attained. But as a rule I think clerks are happier if they remain in their own surroundings and class, and that is, of course, the fate of the large majority of them.

The clerks have done much of late years to improve their own education and mental equipment. They have formed a Managing Clerks' Association for mutual improvement and for

the protection of the interests of their class. This association holds meetings three or four times a year at which they get a Judge, or someone else eminent in the profession, to preside, and at which a paper on a legal question is read by some expert. They also have benefit societies to assist their necessitous members. Latterly, since the war, they have formed a Law Clerks' Union, by means of which a sort of Whitley Council has been formed in London of representatives of the union and of the Council of the Law Society to discuss questions of wages and the economic changes brought about by the war. Similar councils have been formed at provincial centres.

As a class solicitors' clerks have suffered heavily as the result of the changed economic conditions brought about by the war. The pre-war salary of a managing clerk whose duties I have described ranged from £200 to £400 a year, and the salaries of the subordinate clerks ranged downwards to the copying clerk, who received about 30s. or £2 a week. Under existing conditions these are not living wages for men who have to wear black coats and keep up certain appearances. I am glad to think that solicitors as a general rule recognized this before the formation of the Clerks' Union and raised the salaries of their clerks by an average of, I should estimate, 60 or 70 per cent. The charges which solicitors are authorized by law to make against their clients have been increased since the war by 33⅓ per cent. Therefore, in raising the salaries of their clerks to the extent mentioned, they cannot be said to have acted ungenerously. In cases of solicitors in considerable practice this, I believe, has been generally and gladly done. But a difficulty has been caused by the fact that a great number of solicitors are themselves struggling men, earning a very modest income, and hard hit by the rise in the cost of all the necessaries of life. For these men it may well be impossible to give their clerks a greater rise upon their pre-war salaries than in proportion to the authorized increase in their own charges. That is a matter which is now under discussion by the joint councils above referred to, and as I am a member of the London Council I can say no more about it except that every member of that council representing the employers is actuated by the kindliest feeling towards the clerks and a desire to do everything that is possible to ease for them the acknowledged difficulties of the situation. The miners struck work recently because they had only obtained a rise of 155 per cent. on their pre-war wages, whereas they claimed, I think, 161 per cent. Solicitors have to be content with 33⅓ per cent., and I hope it will be possible to give their clerks generally

not less than the 60 or 70 per cent. which a large number of them are already receiving, so far as this can be done without injustice to the needier members of the profession. The joint councils, however, are only councils of conciliation. They have no compulsory powers. But in a professional body much can be done by persuasion, and I have little doubt that the profession as a body will follow as far as possible any recommendation which the councils may make.

Solicitors are officers of the Court, and there are two results of that status on which something should be said. The first is that, as officers of the Court, they are subject to the summary jurisdiction of the Court. The second is that their professional charges are regulated and controlled by Rules of Court except as regards conveyancing and non-litigious matters, in which they are regulated by a committee of Judges and solicitors set up by statute.

The disciplinary power of the Court has not in theory been interfered with by the Act of 1919 already referred to, by which the Discipline Committee of the Law Society has power to deal with and adjudicate upon all complaints against solicitors. But in practice I anticipate that the powers of the Court will in future be seldom used. In theory a Judge to whom any conduct of a solicitor appears to require explanation has power to take disciplinary action himself, but in practice the Judge in such circumstances, since the Act of 1888 was passed, has sent the papers in such cases to the Law Society for investigation. That course is obviously fairer to the solicitor than that the Judge should himself exercise his disciplinary powers. He has perhaps formed his opinion on insufficient information and without having had time to consider the circumstances attending the conduct complained of. An amusing instance of the liability to error in opinions formed hastily upon the Bench occurred the other day. An eminent Judge in the Divorce Court animadverted severely upon a letter written by the solicitor of one of the parties in a case being tried before him. He called upon the solicitor to explain his conduct in writing the letter. The solicitor went into the box and justified himself by producing the draft of the letter settled by counsel who had afterwards been raised to the Bench and, as a Judge, had been a predecessor of the learned Judge who was trying the case. If the solicitor had written the same letter without the advice of counsel who afterwards became a Judge it would have gone hard with him, owing to the wrong view which the trial Judge took of the letter. It is fair to assume that the letter was a perfectly proper

one. The Judge's criticism was silenced at once when he learned that his predecessor on the Bench had drafted the letter, and, but for that circumstance, the solicitor might have had the annoyance and humiliation either of unfavourable comment from the Bench on his conduct or possibly of having to defend himself on a complaint sent by the Judge to the Law Society. The case shows the importance of calm consideration of such complaints by a body entirely removed from the prejudices and emotions engendered in the litigation out of which the complaint arises. The practical transfer of the jurisdiction to deal with such complaints to the Discipline Committee of the Law Society is a great protection to solicitors and a great benefit to the public who have any genuine complaints to prefer.

The other result of the position of solicitors as officers of the Court is that their professional charges are regulated by law. They are the only profession who are prohibited by law from charging what they like. A barrister or a doctor or an engineer, or an expert of any kind, except a solicitor, can charge what fees he pleases. The remedy of the client is to go elsewhere if he thinks the fees excessive. Not so with solicitors. The client can always have his solicitor's bill taxed, and the taxation is regulated by an authorized scale of charges which will be applied by the Taxing Master with the same strictness whether the solicitor concerned is the most experienced man in the profession or is a youngster admitted yesterday. The scale by which the costs of litigation are regulated is an antiquated one, and bears but little relation to the actualities of to-day. Probably one of my hearers has had from time to time the misfortune of having a solicitor's detailed bill of costs presented to him. If so, I will undertake to say that he has not read it, or if he has tried to read it he has not understood it. I have been credibly informed, and I believe, that the only part of such a document which interests the ordinary client is the total.

As illustrative of the absurdity of the charges which a solicitor must make against his client may be instanced the authorized charge which, in matters of litigation, the solicitor may make for an attendance on his client. This is 6s. 8d., a time-honoured charge once represented by a coin of the realm. This charge covers any advice which may be given in an interview of, say, half-an-hour's duration. The same amount is the authorized charge for the attendance of the office boy at counsel's chambers to deliver the brief. That is to say, the law, according to the authorized scale, values the advice which a solicitor may give his client, and which may be the result of a lifetime's experience

and training, at exactly the same sum as the service of a boy-messenger for probably less time. The client may, and sometimes does, object. He says, "Why should I pay you 6s. 8d. for sending your office boy, earning a salary of 12s. a week, to counsel with my papers?" The only answer which a solicitor has is, "Because the law allows me to make such a charge as compensation for the wholly inadequate charge of 6s. 8d. which I am allowed to make to you for taking up half-an-hour of my personal time, and for advice which may be worth thousands of pounds to you." Legally the answer is perfect. The charge is justified, and would be allowed on taxation. But it is very irritating to the client and very humiliating to the solicitor. For that reason the practice has sprung up of late years of solicitors not rendering their bills in detail, but rendering a summarized bill giving the total charges only and the total disbursements. As I have said, the total is the only part of the bill which does interest, or ought to interest, the client, and the only part which he would understand.

If a man has confidence in his solicitor he can trust him to charge only a fair sum, just as he trusts his doctor, who never renders a detailed bill. If the client cannot trust his solicitor to that extent he ought not to employ him. Yet, until recently, the rendering of a bill in lump-sum form was wholly unauthorized and legally ineffectual. A solicitor could not have sued on such a bill, and, even if the client had paid it, he could afterwards call on the solicitor to render a detailed bill and have it taxed. This was a state of things against which the Law Society has protested for years, and quite recently an order has been made under the Solicitors Remuneration Act authorizing solicitors to render lump-sum bills, subject to the client's right to require details and taxation within a year and before payment. The difficulty is therefore, on the surface, removed—but only on the surface, because the ridiculous system remains of preventing solicitors from charging adequate fees for the work they really do and, in compensation, allowing them to charge for work which they do not do. This is the way in which the lump sums shown in the bills which will now be universally rendered in that form are made up—a preposterous system which has only survived because laymen have not understood it.

It will be understood from what I have said that the preparation of a solicitor's bill of costs is a work of considerable intricacy and skill. Clerks have to be kept for the purpose who must have a thorough knowledge of the scale and be able to insert the charges which, though representing no real work, are

yet authorized, and to omit or modify charges which, though representing actual work and experience of substantial value, are not authorized by the scale or are authorized only to an amount which, taken by itself, is quite inadequate. Hence you will notice that, in the office organization sketched above, I have included a "Costs Department." In an office of any size there must be three or four clerks engaged in nothing but making out bills of costs—wholly unproductive work which would be unnecessary under any reasonable system of professional remuneration.

This is one of the blemishes in the picture which I promised at the outset that I would not conceal.

But, after all, these things which I have been talking to you about—the Law Society, clerks, costs, and so on—are the mere fringe of a solicitor's professional life. The essence of it—the real thing which makes his professional life worth living—is his relations with his clients. No doubt a solicitor sometimes has to bear in mind St. Paul's behest "to suffer fools gladly," but that is exceptional. A man, it has been said, must have at least two friends, his doctor and his solicitor. The one administers to his bodily health and the other to his mental comfort. It is a very pleasant thing to be told by a client after a quarter of an hour's talk that his mind has been greatly relieved by what one has said, and that he goes away a far happier man than he came. One cannot always administer that balm. Sometimes, on the contrary, what one must say is the reverse of comforting. Still, the balm-giving interviews far exceed those of an opposite character. Most of the mental troubles which afflict mankind are the products of their own fancies or exaggerated apprehensions and can be relieved by the application of a little cool reason. It is a pleasant thing, too, to realize that there are a substantial number of people who rely on one's judgment and turn to one whenever any difficulty arises and who regard one with feelings of confidential friendship. Lord Hannen said, "An honourable solicitor is a family blessing." It might also be said by a commercial man that "an honourable and competent solicitor is a business blessing." A solicitor who, at the end of his career, knows that these things are said and thought of him by a large number of people does not feel that his life has been spent in vain. He may not have made two blades of grass grow where one grew before, but he has brought to many comfort where there was discomfort and hope where there was despair. Therefore I end as I began, by saying that the solicitor's profession, with all its drawbacks,

difficulties, and temptations, does, when properly conducted, do nothing but good, and it offers adequate scope for the activities of any man of ability and character.

S. Garrett.

EXECRABILIS IN THE COMMON PLEAS: FURTHER STUDIES.

UNDER the above title Professor Maitland gave a characteristic study of the relations of the Common Law Courts to the Canon Law in the reign of Edward the Third.[1] His object was to trace the history of an attempt by the temporal authority to "enforce" (for its own ends) the provisions of the papal Extravagant "*Execrabilis*" by securing its recognition in the Court of Common Pleas and excluding the spiritual Courts from their claim to the sole cognizance of the matters covered by the Bull. To his treatment of the subject it may be objected, with all due deference, that the Bull *Execrabilis*, interesting as it is, cannot be regarded as an altogether new factor in English law calling into operation an entirely new set of phenomena that can be isolated and studied alone; on the contrary, when the Bull made its first appearance in the English Courts of Common Law it became immediately involved in a fairly old dispute between the spiritual and temporal jurisdictions. This aspect of the subject received no consideration in Maitland's essay, with the result that his treatment of the matter is incomplete and in one important particular incorrect.

Let us state at once that neither these, nor any other words in this article, are meant in the spirit of censure of the distinguished scholar to whom they refer. He has, in fact, been the victim of a too deferential public, which has attached to his *Canon Law* a weight and authority which he did not mean it to bear. In his preface he explained that it was based on "studies which must not be called long or profound," and that their publication was due to a hope that "they may perhaps do a little to promote the further exploration of a not uninteresting tract of English history, and in that case I shall not regret a trespass which I am not likely to repeat." It is, therefore, clear that Maitland regarded the work as an excursus, or a raid into unfamiliar country, and in this light we may freely, if respectfully, criticise his suggestions, at the same time paying wholehearted homage to an extremely brilliant piece of pioneer work which has profoundly affected the study of mediæval canon law in England.

[1] Canon Law in the Church of England, pp. 148—157.

This larger dispute in which *Execrabilis* played an interesting but subordinate part was the conflict of jurisdiction which arose over the question of the plenarty or voidance of a benefice when these facts became an issue in the temporal Courts. The action of *Quare Impedit* began with a possessory writ calling on the impedient to show why he had hindered the demandant from presenting to a particular church "which is vacant." As it was a frequent defence for the impedient to deny that the church was vacant as the writ supposed,[2] there was at once the problem of how such an issue should be tried. Only two courses were open—either the Court's reference to the Ordinary for his certificate of the fact, or the use of the common law's own machinery, the jury, summoned through the sheriff. For the moment it will suffice to say that until the early years of Edward III's reign the regular procedure was to refer all issues upon the voidance or plenarty of churches to the Ordinary for his certificate, the Courts of common law claiming no competence to decide such spiritual facts by averment to the country. The history of this doctrine and the stages of its decline and fall will be considered in some detail later; for the present we shall investigate the effect of the Bull as illustrated by the cases quoted by Maitland.

Execrabilis[3] was issued in 1317 by Pope John XXII; only two of its provisions are concerned with our present subject. Of these, the first enacts that if any clerk held in plurality more than one benefice with cure of souls, he should resign them all save one within a month after notice[4] of the constitution, failing which they were all to fall vacant *ipso jure*; similarly, it was provided that in the future any beneficed clerk who accepts a second benefice shall be *ipso jure* deprived of the first, and shall resign it, on pain of losing the second also. Secondly, all churches falling vacant as a result of the constitution were reserved for the Pope's collation. Edward II was obviously too much engrossed in his political and household difficulties to take much action against this serious invasion of the rights of English patrons, whether lay or clerical, and the Pope collated freely to English benefices.[5]

Early in the reign of Edward III, however, it occurred to some Crown lawyer that the first of these provisions of the Bull

[2] This exception did not avail, however, if the demandant were the King until the Statute 14 Edw. III, st. 4, c. 2.

[3] *Cap. un. in Extra. Johan.* tit. 3.

[4] "Notice" has here the technical meaning of the period of two months from the publication of the constitution; Hostiensis, De Const. § Quando, with which compare Nov. LXVI.

[5] For the effect of John XXII's legislation in England, see Tout, Edward the Second, 228—235.

Execrabilis might be turned to the King's profit in the temporal Courts if the second portion dealing with papal reservations were ignored. The experiment was, therefore, tried in 1335, when the King brought an action of *Quare Impedit* against the Bishop of Norwich, demanding a presentation to the Deanery of Norwich.[6] The King's case rested on rather technical grounds. Roger Snettisham had accepted the Deanery of Norwich on the gift of the impedient's predecessor in the See of Norwich (who had died ten years before the action), although at the same time he was parson of Cressingham, and continued to hold both these benefices in plurality contrary to the Pope's constitution, whereby the deanery became *de jure* vacant, and continued so vacant after the death of the then Bishop. As the temporalities of the See thereupon came into the King's hand by reason of his prerogative, all its patronage belonged to him for the time of the vacancy. The right of filling the deanery, therefore, belonged to Edward II, and from him descended to Edward III, the present demandant.

Rokeby, for the defence, argued as follows: "Sir, you see clearly how he takes as cause of the vacancy the constitution of plurality and does not put forward any matter of fact which would give this Court cognizance, such as resignation, deprivation, death or succession. Wherefore, we do not think that this Court will take cognizance." The Crown replied that the constitution was a general judgment, and just as binding as if it were a particular one—and even more so; the parties demurred on this point, but no judgment appears either in the report or in the roll.

In expanding the Year Book's account of the case, Maitland (in imagination) addresses the Court thus: "If a particular judgment of deprivation were given against a clerk and were certified to this Court, you would hold that the benefice was vacant." We can find nothing to support this assumption that a certificate of deprivation was necessary before the Court of Common Pleas could regard the living as vacant. On the contrary, the Bishop's own counsel had confessed that deprivation (*i.e.*, a particular sentence) was a "matter of fact" that "lay within the cognizance of this Court"—an admission, as we shall show later, in accordance with very recent changes in the law. But this was not the question involved in the dispute; the point of Rokeby's argument was that a vacancy *de jure* could not be treated as a matter of fact which lay within the knowledge of

[6] Maitland, Canon Law, 150; Hil. 10 Edw. III, 3 (continued from Trin. 9 Edw. III, 14).

the countryside. He is obviously making the most of the phrase "*de jure*" in the Bull, and insisting upon a contrast with vacancies *de facto*, of which the Court of Common Pleas (as will be shown later) was just beginning to take cognizance. The argument was more clearly expressed in another case by Thorpe, who said: "There is voidance *de jure* and voidance *de facto*, but voidance *de jure* does not give an action for a patron without voidance *de facto*." [7]

The first thing that we would direct attention to in this case is the Bishop's willingness to allow that voidances by death, resignation, deprivation or succession were all within the cognizance of the temporal Court; this corresponds to the issue on the "voidance" (as distinct from "plenarty"), which later became the undoubted right of the jury to try, and the history of which we shall relate later.[8] Secondly, it is difficult to justify Maitland's comment that "they were proposing to enforce a papal constitution directly and without any certificate from the English Ordinary." The question of "enforcing" the constitution did not arise; the Court of Common Pleas did not propose to sentence Snettisham to deprivation in pursuance to a papal statute—there was no need. The Apostolic See had published a Bull depriving all clerks guilty of Snettisham's offence, and there could be no doubt that he was deprived. The question was not one of enforcing a Bull, but of "taking notice" (in later phraseology) of its effect when that effect took place without the intervention of an ecclesiastical Court.[9] In the form of "notice" the question was debated for centuries after these cases. We must conclude, in fact, that the root of the matter was whether the Common Law Court should or should not take notice of the *de jure* effects of spiritual legislation when it automatically gives rise to common law rights of action. Certain ecclesiastical events were held to be so "notorious" that they lay within the notice of the Common Law Courts and of the public in general, but the lack of the later technical terms had served somewhat to obscure the point under discussion—which was apparently novel at the time.

In passing, we would also direct attention to the oppressive character of the King's claim; [10] his right had accrued in 1325,

[7] Y. B. 14 & 15 Edw. III, 36—38. Parning, C.J., K.B., seems to have given judgment against Thorpe's point. See below, p. 68 for the patron's position.

[8] Below, p. 67.

[9] If such a pluralist were ejected by the Bishop he could not allege spoliation or obtain restitution, but there is nothing to suggest that the Bishop was bound to eject a pluralist from a benefice which was *de jure* vacant. See the gloss to Execrabilis, ad v. *ipso jure*.

[10] Claims of this sort are found as early as 9 Edw. II (Fitz. Presentment al Esglise, 11).

but no action was taken until ten years later, when the peaceful holder of the deanery was suddenly threatened with the loss of his benefice. The obvious injustice of such actions was soon afterwards removed by the Statute 14 Edw. III, stat. 4, c. 2, which enacted (in consideration of a large clerical subsidy) that henceforth if the King or his heirs claimed a presentation to a church in the right of another (*i.e.* by reason of episcopal temporalities being in his hands, or infant patrons in his wardship, etc.) he would not insist upon being answered if more than three years had elapsed between the voidance which he claimed to fill and the bringing of the action—in other words, plenarty for three years was to be a sufficient exception to his writ; and secondly, in no case would the King demand an answer to claims to prerogative presentation which accrued to his ancestors. The royal Courts were dutifully reluctant to put this statute into operation, and even went so far as to deny its validity.[1] We are, therefore, not surprised to find that in a long list of grievances which the clergy presented to the King in Parliament in 1352, it is alleged that the statute is not observed, and so the clergy prayed the King "to command that they [this and other statutes of clerical liberty] be observed and kept henceforth in all points and that your Judges allow them as is reasonable." The King's reply was extraordinary; "of his good grace" he repealed the very statute they had besought him to confirm, save only in the particular relating to claims derived from his predecessors.[2] The date of this repeal significantly coincides with the next case quoted by Professor Maitland.[3]

The facts were very similar to those of the previous case: John of Sandale held several churches in plurality (including that of Wimbledon) for a month and more after the constitution *Execrabilis*; consequently the latter became *ipso jure* vacant, remaining so vacant until the death of its patron, the Archbishop of Canterbury, whose temporalities and the right to present thereupon fell into the hands of Edward II, from whom the right to present descended to the present King. The impedient's argument was the same as Rokeby had tried in the previous case, namely, to point out that the cause of action upon which the King sued was not within the cognizance of the Court of Common Pleas and ought to be pleaded in Court Christian. The Judges warned them that this was an "exception to the action,"

[1] "Thorpe, J. 'Some people hold that statute to be of no effect to foreclose the King, for it was never put into operation.' (And so said Scot, C.J.) 'So now for your answer over.'" Y. B. 19 Edw. III, 170.

[2] Rot. Parl. ii, 244 (58); 25 Edw. III, stat. 6, c. 2 (cf. c. 1).

[3] Maitland, Canon Law, 152; Pasch. 26 Edw. III, 3.

and in view of this they dared not demur there, fearing to hazard the whole case upon such a doubtful point of law. They therefore pleaded to an issue upon the chronology of the facts alleged in the King's claim, and eventually a jury found for the King. Indeed, the King's count, as enrolled upon the record, contained allegations which Maitland has shown to be false, while the verdict of the jury was equally untrue. So scandalous was the whole affair that the King soon afterwards had a writ enrolled dated April 22, 1352, confessing that the verdict was "feigned and untrue" and revoking the presentation he had made. This not unnaturally surprised Maitland, who was well aware of the King's reputation for legal trickery. We would suggest, however, as an explanation of the King's unwonted virtue a certain petition presented to him by the clergy in the Parliament of this very year which contained some very plain language, notably to the effect that the clerks whom the King had presented to several livings on the authority of false verdicts were mere "spoilers and robbers of the Church," and adjuring him for his soul's health to stay his hand—a rebuke so solemn that the King was evidently impressed.[4]

But by far the most remarkable feature of the case is the fact that it is in direct contradiction of the King's grant, confirmed in the statute of the very same year, promising that he would not claim presentations upon prerogative titles which had accrued to his ancestors. The hapless defendant probably felt that the failure of his first proposal to plead to the action was ominous of the attitude of the Court towards ecclesiastical liberties, and therefore concluded that it would be safer to take issue on the facts (which he knew were in his favour) rather than trust to the uncertain promises of the King. But the whole country seemed as much incensed against the clergy as the King was, and so the only result was another addition to the long list of untrue verdicts for the Crown, of which the Bishops had recently complained so bitterly in Parliament. Even granting that such a case as this is a proper historical source for the law of the period, there is nothing to show that our remarks upon the previous case do not equally apply to this also. The verdict of the jury was that Sandale had held the church of Wimbledon for six weeks in plurality with other livings, and that this was after the publication of the constitution *Execrabilis*. Maitland remarks that the case is "proof that the Court of Common Pleas was prepared to put in force one half of the notorious

[4] Rot. Parl. ii, 244 (59).

Extravagant, and this without requiring any sentence of deprivation pronounced by an English Ecclesiastical Court." But we would suggest that here again the question is clearly one of "taking notice" of the papal statute, which, like the statutes of the King, was published to all and sundry, while it is equally incorrect to describe the temporal Court as "enforcing" the Pope's constitution. It is, moreover, necessary to bear in mind that the Bull did not declare the pluralist's benefice "voidable" (in which case we should certainly expect the royal Court to require a certificate of voidance before discussing the question of presentation) but declared it "void"—a matter of which there could be no doubt, and which did not require any further action to give it full legal effect. The other half of the Bull reserving vacated benefices for the Pope's collation was in these cases rendered inoperative by the Statute of Provisors, although lay patrons had as yet no remedy save *Quare Impedit*.

Before proceeding to the discussion of the Statute 25 Edw. III, stat. 6, c. 8, and criticising the interpretation of it by Professor Maitland, we must now revert to the larger topic of the trial of voidance and plenarty in general (*i.e.*, when the operation of *Execrabilis* is not involved) in order to put the statute in its right position at the point where these several lines of history converge. So far we have discussed the question whether a temporal Court should take notice of a voidance *de jure*. We now pass to the much more crucial question as to whether it should take cognizance of voidance and plenarty in general when they are pleaded as issues in temporal litigation, and presume to ascertain by means of a sworn jury of the countryside whether a benefice was void or full at any particular time.

The early law upon the subject is stated without the slightest hesitation by Bracton[5] in terms which do not admit of any doubt; "A layman has no more cognizance of vacancy than he has of matrimony," and Fleta[6] concurs. The earliest extant reports[7] suggest that this was the accepted theory; thus an issue of voidance went to the Bishop in 1305,[8] and an issue of plenarty was similarly referred to the Ordinary in 1310.[9] A generation later we find the plenarty of a chantry sent for certi-

[5] "Si de advocatione contentio habeatur utrum vacat vel non, super hoc erit ordinarius consulendus, episcopus vel alius qui super hoc habeat cognitionem, quia laicus de hoc cognoscere non potest, non magis quam de matrimonio contracto vel soluto," Bracton, f. 241 *b*, citing a case of 1220 in Bracton's Note Book, 1428.
[6] Fleta, 322, § 9.
[7] Y. B. 20 & 21 Edw. I, 283.
[8] Y. B. 33 & 35 Edw. I, 178.
[9] Y. B. 4 Edw. II, 182.

fication to the Bishop,[10] and in another case it was said that "the Bishop had enquired of the vacancy, as well he might,"[1] while yet again in the same year an issue of voidance was sent to the ecclesiastical forum.[2] Once only do we find this doctrine disputed, and even then it was judicially affirmed; Derworthy argued in 1342 "we have alleged vacancy which can be tried here by averment," to which Schardelowe, J. answered "we have not to take cognizance in this Court until we are apprised whether the church be full or not," and so he sent a writ to the Bishop.[3]

At this point a new distinction makes its appearance. So far there had been no difference made between "void" and "not full" or between "full" and "not void." Thus we find one party saying "we tell you that the chantry was vacant on the day, etc.," to which the other replied that it was "full," and the Court accepted this as a proper averment.[4] About the year 1344 it appears to have already occurred to someone that if one said a church was "void" the counter-assertion that it was "full" did not constitute a complete traverse, for it might be that a church was "not void" and yet not technically "full." This distinction created some new possibilities, notably that one had two issues possible where before there was only one; that is to say, there could be an issue on the "voidance" or on the "plenarty" of a church according to circumstances.[5] It may be conjectured that the source of this distinction was a shifting of the meaning of the term "full" in the direction of restricting it to a church into which a clerk has been instituted.

Simultaneously with this arose another novelty; the temporal Court attempted to try one or both of these issues by averment to the country. Here then we get a direct challenge to the ecclesiastical Courts, and it will be our duty to follow its progress through the reports. In 1345 we find that an issue was taken in a special form, *i.e.* "instituted on the Bishop's collation," and that this issue (virtually of plenarty) was sent for trial by the country.[6] In the same year, moreover, we also find it stated (in another case) that an issue of "voidance" should be general and not allege a certain cause, and should be

[10] Y. B. 17 Edw. III, 201 *n.*
[1] Y. B. 17 & 18 Edw. III, 114.
[2] Y. B. 17 & 18 Edw. III, 331.
[3] Y. B. 16 Edw. III, ii, 573. The Record printed by the Editor throws interesting light upon the Bishop's method of ascertaining the facts.
[4] Y. B. 16 Edw. III, ii, 573.
[5] Y. B. 18 Edw. III, 168.
[6] Y. B. 19 Edw. III, 64.

tried by inquest.[7] The next year the new doctrine is stated by a Justice in the Court of Common Pleas: "Plenarty will be tried by the Court Christian, but void or not void will always be tried here."[8] In 1348 it was still law that plenarty was to be tried by the Bishop.[9] Thus by the time we reach the date of the Statute of 25 Edward III the simple doctrine of Bracton has been divided into two parts, of which the Common Law Courts claimed one, and had occasionally trespassed upon the other. The situation undoubtedly gave cause for alarm to the Church lawyers.

This, however, was by no means all that the Church could complain of against the lay powers. Not only had the royal Courts assumed cognizance of issues upon the vacancy of livings, and even presumed to take notice of vacancies *de jure*, but a third act of aggression had been made against the ecclesiastical position. This time the attack came from the lay patron rather than from the lay Courts. His pretensions were thus expounded by Shareshulle, J.:—[10]

> ". . . In the case of a church where a parson is deprivable *de jure* and the church is void *de jure* and not *de facto*, the true patron shall present and his presentee at law shall sue for the deprivation of the other, and when he is deprived by law of Holy Church the presentation made when the church was *de facto* full shall take effect. . . . And in some people's opinion if the patron shall not present within six months of the vacancy *de jure* (although the church be full *de facto*) by lapse of time the right devolves to the Ordinary."

This doctrine was not allowed to pass unchallenged by the eminent pleader R. Thorpe, who rejoined:—

> "Certainly not; he has not to take notice [*conustre*] nor to present before deprivation; and the deprivation shall be notified to him in the case of a presentment to a church, which is spiritual, so that time does not run against him until after the deprivation and after the notification. . . ."

Nothing more is reported and no decision or enrolment has been found. Nevertheless the case serves to show the new direction in which opinion was moving at the time. It is a matter for regret that our common lawyers are not reported to have

[7] Y. B. 19 Edw. III, 78. It was at first proposed to include in the issue an allegation that the voidance was due to plurality, but this was not allowed. Compare Y. B. 20 Edw. III, ii, 400—2.

[8] Y. B. 20 Edw. III, ii, 396.

[9] Fitz. Triall, 70.

[10] Y. B. 17 & 18 Edw. III, 264—6.

carried the warfare into the enemy's country; for there is a passage in the Canon Law books upon which we should very much have liked a fourteenth-century English opinion, not only because of its bearing upon the present case but also as throwing some light upon the more general dispute. The principle underlying *Execrabilis* was by no means a new departure in Catholic legislation, for the "notorious Extravagant" was in fact mainly a refurbishing of the once terrible *De Multa*, with the drastic addition of the clauses reserving all vacated benefices for the Pope's collation. *De Multa*[1] had also used formidable words about pluralists vacating *de jure* their superabundant benefices, but with additional words of explanation which do not occur in the later Bull. These words are to the effect that when one benefice became *de jure* vacant by the acceptance of another, the patron of the vacated benefice may proceed to fill it with another suitable person.[2] Nothing is stated of the intervention of an ecclesiastical Court or official; the patron is evidently presumed to "take notice" of the *de jure* deprivation as soon as the offence incurring it is committed. Does not this clause in the Bull *De Multa*, we ask, fully warrant us for the opinion that there was nothing incompatible with the liberty of the Church in a lay patron taking notice of a vacancy *de jure*? Does not the Church's own law book expressly state that he should? And if a lay patron can be presumed to know whether a church is *de jure* vacant, then it is no very great stretch to allow a lay jury to tell whether a church is void in consequence of the incumbent's pluralism or not. Indeed, it would be hard to deny that if voidance *de jure* lay within the notice of a lay patron, then voidance *de facto* could also be within the knowledge of the countryside. On the other hand, we have shown that the laity's meddling with these matters had aroused the Church's indignation, and as we shall see there was some talk about the Church's liberties. This fact must obviously be explained by putting it beside another, *viz.* that this provision of the Bull *De Multa* was not repeated in *Execrabilis*. A possible reason for this significant omission would be that the Church deliberately withdrew a concession to the lay power which it felt was ill-advisedly granted; but still more likely is it that the clause in *Execrabilis* reserving vacated livings for the Pope's collation was the real reason for the change. Obviously, if the Pope is to make the next presentation there was no point in

[1] 28, X. 3, 5.

[2] "Is quoque ad quem prioris [beneficii] spectat donatio, illud post receptionem alterius libere conferat."—*De Multa.*

directing the patron to take notice of a vacancy which he was forbidden to fill. This is the simplest and, we think, the most likely explanation: but, all the same, it is noteworthy that the provision of the Bull *De Multa* was preserved among the Decretals, bearing witness to all who read that the Church had allowed lay patrons to take notice of voidances *de jure*.

There were other variants of the same conflict of jurisdictions; thus a prebendary who was elected dean was stated to have vacated the prebend, since another prebend was attached to the deanery. This fact was disputed and made the issue of litigation in the temporal Court. The jury found that the deanery had a prebend annexed, the Court took cognizance of the *de jure* vacancy, and awarded the next presentation to the King.[3]

We have now traced three lines of development as far as the twenty-fifth year of the reign of Edward III—the claim of the Common Law Courts to take notice of vacancies that are only *de jure* in Canon Law;[4] the larger question of the trial of issues of voidance and plenarty by the countryside;[5] and the pretension of lay patrons to take notice of *de jure* vacancies and to present at once without notification from the Ordinary.[6] It now remains to consider the bearing of all these upon the statute, and to ascertain its precise meaning and significance.

Among the articles of the long list of *gravamina* to which we have already had occasion to refer[7] is the following petition[8]:—

> "May it please you to grant that henceforth no Justice shall hold plea of the vacation of any benefice of Holy Church by reason of insufficient age, consecration as Bishop, resignation, plurality, inability, or other voidance *de jure*, for no such avoidance lies or can be in the cognizance of lay folk; but if our Lord the King desires to take advantage of such avoidance *de jure*, let a mandate be sent to the Archbishop or Bishop of the place where the benefice is, bidding him enquire touching this matter in due manner according to the law of Holy Church, as is done in the case of bastardy."

[3] Y. B. 14 & 15 Edw. III, 38. For another point (raised later in the statute, below, p. 71), see Y. B. 19 Edw. III, 76—8, where the King claimed a presentation to a prebend the vacancy of which he alleged to be due to the prebendary having been created Bishop of Utrecht. "Et ceo fuit chalenge pur ceo qe tiel cause en ceste court ne poet estre trie.—Non allocatur. qar voidaunce serra generalment trie."

[4] Above, pp. 61—66.

[5] Above, pp. 66—68.

[6] Above, pp. 68—70.

[7] Above, pp. 64, 65.

[8] Rot. Parl. ii, 245.

To this the King replied in unexpectedly conciliatory tones, if one can judge from some of his other answers to the same schedule of protests: "If such avoidance came in plea before his Justices whereof the cognizance belonged to Court Christian, the party should have his challenge and the Justices should do right." It will be observed that the statute which confirmed the King's response[9] is in almost identical terms:—

> "Whereas the said prelates have prayed remedy because the secular Justices accroach to them the cognizance of the voidance of benefices *de jure*, which cognizance and discussion belongeth to the Judge of Holy Church and not to lay Judge; so the King willeth and granteth that the said Justices from henceforth receive such challenges made or to be made by any prelates of Holy Church in that behalf and moreover shall do right and reason thereof."

Professor Maitland's comment is as follows:—

> "This statute, like many others which touch the relations of the temporal to the spiritual tribunals, looks very much like an 'as you were.' Bishops and Justices must fight the matter out: both parties should be reasonable; but the King does not like to decide their quarrels.
>
> "I believe that the Justices held their ground . . . "

—basing that belief on two cases of Coke's day, some three hundred years later.

Will the statute bear this interpretation? Is it likely that the King would stand aside in a conflict between his own Courts and those of the Church as if he were a disinterested—and even a rather bored—spectator? Besides, was not the quarrel of his own making? And has nothing happened between Edward III's day and Coke's?

An examination of the texts, we believe, will show the contrary. In the first place it will be noticed that the petition only mentioned the question of the trial of issues of voidance, whence we may conclude that the Church did not regard the suggestion of patrons taking notice of voidances *de jure* as sufficiently serious to call for protest at such a critical time. It is probable that it still remained an open question, unless, indeed, the settlement of the other cause of dispute could have been regarded as precluding any possibility of doubt upon it. On the other hand, the petition assumes a very wide significance for the term "voidance *de jure*," including under it voidance by

[9] Statute 25 Edw. III, stat. 6, c. 8.

resignation, which the common lawyers would almost certainly have regarded as a voidance *de facto*. Secondly, it is difficult to see what suggested to Maitland that this statute was a non-committal "as you were"; to us there seems no room for doubt that it was, on the contrary, a frank concession to the Church. It repeats the Bishops' complaint, does not deny their allegation that the Justices had "accroached," confesses that the "cognizance and discussion belongeth to the Judge of Holy Church and not to lay Judge," and concludes all this with a "grant." The terms of the grant are equally plain; prelates are to have their "challenge,"[10] and the King's Justice is to "allow" it. Can there be any doubt about this? Surely the King had decided their quarrel, and decided it in favour of the Church; as far as statutes could avail, the question was closed.

The fact that Maitland had to go to the seventeenth century to continue his story of vacancies *de jure* is extraordinary and needs an explanation. If the statute were flatly disobeyed the Year Books would undoubtedly have told us, and the same may be assumed almost as certainly if the statute had ever been enforced. Judging from the silence of our reports, it would seem as though the question had ceased to arise after the Act was passed. It may be that the passing of the Statute of Provisors in the same Parliament, together with the royal policy of connivance at its infringement by the Pope, afforded the Crown as much control over the disposition of benefices as it desired, and at less risk of exciting ecclesiastical opposition. Only one case bearing on the question of the cognizance of vacancies *de jure* has been found to fill this gap, and this is the extraordinary case of the Miscreant Cardinal in the fifth year of Richard II, when the Court of Common Pleas summoned a jury to sit at a place in Durham to find whether a certain Cardinal at Rome was a misbeliever, in consequence of whose miscreance the church in question was vacant.[1]

For the question of voidance in general (not being *de jure*) there is slightly more material. The distinction between issues upon voidance and those upon plenarty was still maintained, the former being claimed by the lay Court and the latter being left to the Church, as described above, but in 21 Richard II we get a new departure in the decision that voidance by deprivation

[10] That "challenge" is equivalent to "exception" may be seen from Y. B. 6 & 7 Edw. II (Eyre of Kent), i, 176; Y. B. 16 Edw. III, i, 178; Y. B. 20 Edw. III, ii, 161. "Allowing a challenge" is explained from the text quoted above, p. 70, n. 3.

[1] Fitz, Triall, 54; this case is being investigated further.

should be tried by jury, as it would seem,[2] and certainly the production of a papal Bull of deprivation was insufficient to prevent the matter being sent to the jury—besides being an extremely dangerous step to take.[3] This case served for a time to set the fashion of alleging voidance by some special cause,[4] and this became the typical form of the problem under the Lancastrian Kings.[5] Consequently a new distinction was forced between admission and institution on the one hand and installation and induction on the other; the Church succeeded in retaining its right to the trial of the former and the State held the latter, although in 12 Henry IV it was still only after some discussion that an issue of induction was sent for trial by the country.[6] It seems fairly probable that these two groups of formalities in obtaining a benefice were regarded as corresponding to the original distinction between issues upon voidance and issues upon plenarty respectively, since admission and institution are ecclesiastical ceremonies which need not be performed in public but have the effect of creating plenarty, while installation and induction are more of the nature of the temporal livery of seisin, and were performed in the church concerned, being public, and presupposing the previous stages.

The issue of voidance for special cause, on the other hand, probably continued to be triable by the temporal Court at least until 15 Edward IV, when we find the suggestion (from which the reporter dissents) that voidance by death was the only issue triable *per pais*.[7] Indeed, all along the Church's official theory was that voidance for special cause could not be tried except by the Bishop's certificate.[8] The new development was therefore not without opposition, although it persisted until 22 Edward IV, when we find the beginning of a return to the fourteenth-century point of view, *i.e.* that voidance was triable in *pais* and plenarty by the Bishop.[9] This remained the law thenceforward, with the curious addition that the seventeenth-century lawyers based their justification of it upon the fifteenth-century practice, as may be seen from *Boswell's Case*,[10] where it is said that plenarty shall be tried by the Bishop because it is the result of institution,

[2] Fitz, Issue, 147.
[3] 30 Lib. Ass. 19.
[4] Compare above, p. 67.
[5] Doubts on the subject appear under the first Yorkist, Trin. 5 Edw. IV, 1.
[6] Mich. 12 Hen. IV, 21.
[7] Pasch. 15 Edw. IV, 6.
[8] Lynd. f. 144, gl. Ordinariorum.
[9] Called a "common case" by Pigot, Y. B. 22 Edw. IV, p. 24; cf. Trin. 5 Edw. IV, 1.
[10] 6 Rep. 49 *a*.

which is a spiritual act, and that if induction had been the cause of plenarty then the trial would have been in *pais*, since induction is a "notorious" act. Coke used the same argument in *Hitchin* v. *Glover*,[1] and set it out in his commentary upon Littleton,[2] after which there was no doubt upon the subject.[3] To the very end the Church resented the trial of voidance in *pais*, as may be seen from the remarks of the learned Bishop Gibson, who, in writing of the Statute 25 Edw. III, stat. 6, c. 8, adopts the same interpretation of it as we have advocated above, but, at the words "do right," has the following gloss[4]:—

> "The only right that hath been done to the Church in this particular is the finding out and alledging a distinction between full and not full, void and not void. It is granted that whether a church is full or not full shall be tried by the certificate of the Bishop, because plenarty is by institution, which is a spiritual act: but whether void or not void shall be tried by the country, being an act notorious to the country and distinguishable by them. This is affirmed by all the books as current law; but I have not found that any of them have endeavoured to account for this seeming inconsistency between that doctrine and this statute."

Plurality, the main cause of voidance *de jure*, became the subject of temporal legislation under Henry VIII, and when the question of whether the patron should take notice of voidance *de jure* from this cause arose, once more, in the seventeenth century, it was decided that he should, thus preserving the spirit of the Bull *De Multa*, although the details of it were confused with those of *Execrabilis*—but these later blunders of an age to which Canon Law was merely a name, need not detain us here.

By way of conclusion we may shortly state the results of this investigation. In the first place we have traced the history of the Bull *Execrabilis* in the Court of Common Pleas, where the lay power's action may be better described, we believe, as taking notice of its *de jure* effects, than as actually "enforcing" its provisions.[5] This, however, was only part of a much larger and longer movement, whose progress we have related from the days of Bracton downwards, which consists of the steady encroachment of the State upon the Church's province in the matter of the trial of issues concerning the vacancy of churches.[6] Soon

[1] 1 Rolle, 191.
[2] Co. Lit. 344 *a*.
[3] *Watson* v. *Baker*, 1 Siderf. 390.
[4] Codex Juris Ecclesiastici, tit. XXXIV, cap. 1.
[5] Above, pp. 61—66.
[6] Above, pp. 66—67.

this question divides itself into two—issues upon voidance and those upon plenarty—the former of which the State had definitely decided in its own favour.[7]

Another dispute arose when private patrons (with some support from the State Courts) proposed to present to livings vacant *de jure* without waiting for the Bishop's certificate of deprivation.[8] This attitude we have found to be in accordance with the spirit of the earlier Canon Law, and it seems that the action of the lay Courts in taking notice of vacancies *de jure* was not altogether contrary to Church principles as expressed in the Decretals.[9] Nevertheless, the Church regarded all three of these movements in a serious light, and secured the passage of the Statute 25 Edward III, stat. 6, c. 8. Here we have been compelled to differ from Professor Maitland and to regard the statute as a formal concession to the Church on the matter of voidances *de jure*.[10] More than that they did not secure. Royal arrangements with the Papacy transferred the question from the realm of law to that of diplomacy, and nothing more is heard of it until after the Reformation.[1]

As for the other questions, the State maintained, and even improved, its position.[2] The trial of plenarty alone remained of any practical value to the Church, and this it retained until at the Reformation the conflict ceased in the all-pervading Royal Supremacy.

T. F. T. Plucknett.

[7] Above, pp. 67–68.
[8] p. 68.
[9] p. 69.
[10] pp. 70–72.
[1] p. 72.
[2] pp. 72–74.

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[The Editor of the *Law Quarterly Review*, in fulfilment of a promise which he gave upon hearing of the forthcoming appearance of the *Cambridge Law Journal*, has kindly sent the following message of good will and encouragement. —ED.]

TRANSEAT IN EXEMPLUM.

I do not guarantee the quality of the Latin. It is the motto of an institution with which I have the honour to be associated. One member, silencing the voice of conscience, became a fraudulent enlistment at the outbreak of the late war and " went West," a victim of overwork on behalf of his comrades, who bear him undying gratitude. As honourable an end as if he had died upon the field. My next example shall be chosen from among our kinsmen across the Atlantic. You all know Story's works, at least by name. He might have lived a life of cultured ease, but he preferred to put his learning at the disposal of the students of the Harvard Law School. Good fortune, it has been said, knocks once at every man's door; seldom twice. This magazine will furnish you with the opportunity of giving something that has not been paid for by a monetary equivalent, and it rests with you, students of the Cambridge Law School, to determine

whether this infant shall become a virile being or meet with an early death. I trust you will help to obtain the former result. You also will then be able to boast—*Transeat in exemplum.*

I have appealed to your feelings of pride; let me also appeal to your common sense. An army does not consist entirely of general officers, and the majority of us have to be content to live among the rank and file. Most members of the legal profession, early in their career, are glad to find the means to prevent their faculties rusting from disuse. One method is the writing or editing of law books.

"True ease in writing comes from art, not chance,
As those move easiest who have learn'd to dance."

You will find in the pages of the *Cambridge Law Journal* the opportunity of practice in the arts of clear statement and consecutive argument, which are two of the prime essentials in writing upon legal topics.

And now for a confession. My general appeal to you to become contributors is not an unselfish one. The *Law Quarterly Review* cannot be carried on successfully with depleted ranks. We are still at full strength, and there is a small reserve at the depôt, but it would be comforting to know that there was a personnel able to furnish recruits when the time comes for us to fall out. My friend Mr. Bolland, who has edited many of the Year Books for the Selden Society, and I have had numerous conversations on the difficulty of finding recruits to carry on his essential work, and he has authorized me to state that he would place his knowledge at the service of those interested in research work. I should be most happy to give to anyone desirous of contributing to the notes of cases in the *Law Quarterly Review* a general outline of the form they should take. A personal interview is desirable for this purpose, preferably by appointment. Personally I should expect to find that those who had graduated in legal literature in the pages of the *Cambridge Law Journal* would furnish reliable notes, criticisms and observations.

A. E. Randall.

RECENT CASES.

INTERNATIONAL LAW.

PRIVATE PROPERTY OF ENEMY ALIENS.

In re FERDINAND, EX-CZAR OF BULGARIA.
C. A. 90 L. J. Ch. 1; [1921] 1 Ch. 107; 36 T. L. R. 898.

THE private property in the United Kingdom of this ex-monarch consisted of certain securities in his own name and others held for his benefit by trustees.

The Crown, by two petitions, obtained two declarations from the Chancery Division that this property was forfeited as from the outbreak of the war between Great Britain and Bulgaria. The ex-Czar was given leave to appeal, and the Court of Appeal reversed the judgments of the Chancery Division.

From the point of view of the international lawyer it is interesting to note that the Court held that at common law the Crown had a right to seize and forfeit private property (including choses in action) of the subject of an enemy State, and that the right had not ceased to exist at the outbreak of the European War (*Porter* v. *Freudenberg* [1915] 1 K. B. 657). Apropos of this, the following quotation from Hall's *International Law* (7th edition) is in point: "It cannot be said that a belligerent does a strictly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon public faith. But the absence of any instance in the more recent European wars, no less than the common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force and that it will soon be wholly extinguished by disuse."

The Crown, in 1919, before the peace with Bulgaria but after the Armistice, did attempt to put this right into execution. But the Trading with the Enemy (Amendment) Acts, 1914 and 1916, have (so held the Court of Appeal) now established as the municipal law of England the hope expressed in the above extract from Hall's work, and have abandoned the common law right of forfeiture.

E. C. S. W.

PRIZE COURT.—DAYS OF GRACE.

THE MARIE LEONHARDT. [1921] P. 1.

THIS was a test case which was brought to decide whether a German steamship found in a British port at the outbreak of hostilities was subject to condemnation, or whether by custom she should have been allowed days of grace in which to depart.

It was decided that, in the absence of reciprocal agreement, there is no right under international law for enemy ships found in the ports of a belligerent to depart freely within a given period.

The *Marie Leonhardt* did not come within the terms of Article 244 of the Treaty of Versailles, by which vessels over 1,600 tons gross were ceded to the Allied and Associated Governments. On her fate, then, depended the destination of all the small German vessels taken under similar circumstances in our ports in August, 1914.

The questions before the Court were: (1) Was there in, say, July, 1914, a rule of international law whereby an enemy merchant ship, found in the port of a belligerent at the outbreak of hostilities, was entitled to depart? (2) Was such a right *primâ facie* conceded to owners of German shipping either by Convention VI of the Second Hague Conference or by diplomatic communications which took place at the outbreak of war? Precedents for giving days of grace were quoted from the Crimean, Franco-Prussian, Spanish-American, and Russo-Japanese Wars. There was no doubt that the Hague Conference of 1907 had tried to abstract a principle from the varying practices, but Convention VI only stated "it is desirable" that days of grace should be conceded. In 1914 His Majesty's Government offered enemy shipping leave to withdraw during days of grace, subject to reciprocal concessions on the part of the enemy States concerned. Austria-Hungary accepted the offer; Germany did not.

The *Marie Leonhardt* was condemned as good and lawful prize.

A. E. R.

CAPTURE OF ENEMY SHIP IN NEUTRAL WATERS.

THE VALERIA. [1921] 1 A. C. 477.

This was an appeal from the Prize Court (England) to the Judicial Committee of the Privy Council.

In March, 1918, a British cruiser captured the *Valeria*, a German steamship, at a spot which was proved to be a few yards within the territorial waters of Norway. This, of course, rendered the capture unlawful (*The Lokken* [1918]; *The Dusseldorf* [1920] A. C. 1034). While the ship was being escorted back to a British base she had to be abandoned owing to bad weather, and was sunk by gunfire to prevent her becoming a derelict. Norway, the neutral whose territorial rights had been infringed by the capture, claimed the value of the ship and damages.

Lord Sumner, in delivering the judgment of the Privy Council, held that, although a neutral Government was entitled to restitution in the case of a ship of a belligerent captured by another belligerent within its neutral waters, the captors did not thereby become insurers of the ship for all purposes. The *Valeria* must be considered as being lost from natural causes, for restitution, if ordered, would have constituted a source of profit to Norway for the loss of a German ship.

It is necessary to distinguish this case from one where there has been a wrongful capture of a neutral ship on the high seas, when the injured neutral would undoubtedly be entitled to full restitution for a subsequent loss from natural causes.

E. C. S. W.

CONFLICT OF LAWS.

In re MACARTNEY; MACFARLANE v. *MACARTNEY.* [1921] W. N. 63.

Cases turning upon the conflict of laws (private international law) are not very common in the Courts of this country.

A testator, domiciled in England, left an illegitimate daughter, born after his death in Malta by a Maltese woman, to whom he was engaged. His assets comprised estates in both countries, though the executors proved the will in England. Four years later, at the suit of the mother, the Maltese Court of Appeal granted a posthumous affiliation order, which is unknown in England, and fixed an alimentary allowance.

The question was whether this judgment could be enforced in England. Counsel for the claimant contended that the declaration of paternity was a judgment *in rem*, carrying with it the necessary consequences of alimony, and that property moved from Malta to England could be followed.

Astbury, J., held the Maltese judgment unenforceable on three grounds: (1) the recognition of the right of an illegitimate child to permanent alimony was contrary to the policy of English law; (2) the judgment was founded on a cause of action unknown in England; (3) the judgment was only *in rem* as regards the declaration of paternity, but *qua* the assignment of alimony was *in personam* against the executors, and, therefore, could not be enforced as a debt against the assets in England.

E. C. S. W.

THE LAW OF PROPERTY.

CY-PRÈS DOCTRINE TO CHARITIES.

In re WELSH HOSPITAL (NETLEY) FUND; THOMAS v. *ATTORNEY-GENERAL.* [1921] W. N. 98.

This case is of considerable interest as illustrating the application of the *cy-près* doctrine to charities.

The question to be decided was whether the surplus of the funds raised during the war in support of the Welsh Hospital at Netley could now be used to establish scholarships at the University of Wales for the encouragement of the study of medicine and surgery by Welshmen.

The alternative was that there was a resulting trust in favour of the subscribers, so that the surplus funds ought to be returned to them, but the principle of a general charitable intention was established to overrule this.

The Court would not go beyond issuing a general declaration on the understanding that the money was to be devoted to some charitable purpose. It would not decide that the particular scheme indicated was the nearest possible and practicable way of applying it in accordance with the original charitable intention.

E. C. S. W.

HEIRLOOMS.—RULE AGAINST PERPETUITIES.

In re HARCOURT; HARCOURT v. *PORTMAN.*
90 L. J. Ch. 122; [1921] 1 Ch. 187.

THIS case illustrates the law with respect to the settlement of chattels for the use of a person for the time being entitled to some particular landed estate, which are popularly termed "heirlooms," and the rule against perpetuities.

Very briefly, there were two questions for decision. Firstly, was it proper to apply, on the particular construction of the will, the general rule that chattels settled as heirlooms with real estate vest absolutely in the first tenant in tail *in esse*? (see the leading case of *Foley* v. *Burnell*, 1 Bro. C. C. 274). Secondly, where a shifting clause as regards chattels is void by reason of its transgressing the rule against perpetuities, will the use of the words "so far as the rules of law and equity will permit" avail to prevent this transgression?

Eve, J., held that, as regards the first question, the chattels vested absolutely in the tenant in tail in remainder at birth, and that, in the absence of a contrary intention expressed in the settlement, the vesting was not postponed until actual possession of the real settled estate.

As regards the second point, it was held that, although in a case of doubt these words may be used in aid of a construction which will not be obnoxious to the rule against perpetuities, the words cannot be effectual to correct a gift which in terms infringes the rule. This followed the conclusion advanced in *Jarman on Wills* concerning the decision in *Harrington* v. *Harrington*, L. R. 5 H. L. 87.

E. C. S. W.

BANKRUPTCY.—WHETHER AN OFFICER ON DEMOBILIZATION CEASES TO BE PROTECTED BY THE COURTS EMERGENCY POWERS ACTS.

COURT OF APPEAL.

In re A DEBTOR (*No. 206 of 1920*). 37 T. L. R. 154.

A RECEIVING order was made by the Registrar against a demobilized officer. He had not been gazetted out of the Service, nor had he received any notice of discharge. The construction of the Courts Emergency Powers Acts exempting officers from bankruptcy proceedings was not disputed. The question was whether the appellant debtor was an officer, and so protected, or not.

It was held that on demobilization an officer's position becomes that of a volunteer liable to be called up; it is analogous to that of a man liable to military service and not called up. This could not interfere with his civil occupations, and it would be absurd to hold that it did. The object of the provision was to protect officers and men actively engaged in warfare and to save them from civil worries. Therefore a demobilized officer resumes his civil status as far as concerns the Acts, and is liable accordingly.

G. W. McL. H.

LANDLORD AND TENANT.—FORCIBLE ENTRY.—DAMAGES.—CLAIM BY TRESPASSER.—5 RICH II., STAT. 1, C. 7.

HEMMINGS AND WIFE v. *STOKE POGES GOLF CLUB.*
[1920] 1 K. B. 720; 36 T. L. R. 77.

An action was brought by persons occupying as servants, and not as tenants, a cottage belonging to the defendants to recover damages for forcible entry and assault. The plaintiffs had received notice to quit and never throughout the action attempted to maintain that they had any right or title to remain in the cottage. They refused to go until they had found other suitable accommodation and were ejected by the defendants' agents. It was found by the jury that no unnecessary force was used and no appreciable damage done to the furniture. *Held*, that the plaintiffs, as trespassers, could recover no damages against the rightful owner for a forcible entry within the meaning of 5 Rich. II., stat. 1, c. 7, no unnecessary force being used and proper care being taken in the removal of their goods.

5 Rich. II., stat. 1, c. 7 makes forcible entry a punishable offence, but it has never been held that it gives the right to bring a civil action to the person complaining of a forcible entry upon land or tenement. It was assumed in this case that the act of the defendants was a forcible entry within the meaning of the statute. In a previous case a distinction had been taken between the forcible entry and the force used in ejecting the trespassers after entry (*Newton* v. *Harland*, 1 Scott, New Rep. 474). Such force, though not beyond what was necessary, was spoken of as an "independent wrongful act" (*Beddall* v. *Maitland*, 17 Ch. D. 174; *Edwick* v. *Hawkes*, 18 Ch. D. 199). These three last-cited cases had met with general disapprobation, and in the principal case the Court disapproved of, and refused to follow, them on the ground that the right to possession was in the defendants, and the acts which were alleged as giving the plaintiffs a right of action were done in defence of the defendants' right to possession, which they had acquired by the alleged forcible entry.

J. D. G.

WILLS.—CONSTRUCTION.—DEVISE.—RULE IN SHELLEY'S CASE.

In re HUSSEY AND GREEN'S CONTRACT. 37 T. L. R. 407.

A testator by his will devised a freehold house to trustees to "hold in trust for my son William during his life and afterwards for his heir-at-law absolutely." *Held*, that the use of the word "absolutely" prevented the rule in *Shelley's Case* (1 Rep. 936) from applying, and the testator's son only took an equitable estate for life.

The word "heir" or "heir male" in the singular number yields more readily to an explanatory context, showing that it is used as *designatio personæ* and not as *nomen collectivum*, than would be the case if the plural number had been used. Where words of limitation are superadded to the

word "heir" or "heir male" in the singular number such words of limitation operate to make the word "heir" or "heir male" a word of purchase, and to exclude the rule in *Shelley's Case* (*Archer's Case*, 1 Rep. 666). It was contended that this rule should be construed strictly, and, further, that the word "absolutely" was of the same effect as, and no stronger than, the words "for ever," the addition of which has not the effect of taking the case out of the rule in *Shelley's Case* (*Dubber* v. *Trollope*, 1 Amb. 453; *Fuller* v. *Chamier*, L. R. 2 Eq. 682; *Silcocks* v. *Silcocks* [1916] 2 Ch. 161). But the Court rejected these contentions, and held that the word "absolutely," when used in such a context in a will, has the same effect as if technical words of limitation had been used: consequently the devise falls within the exception to the rule in *Shelley's Case* established by *Archer's Case*.

J. D. G.

TORT.

WORKMEN'S COMPENSATION.—SUICIDE RESULTING FROM ACCIDENT.

MARRIOTT v. *MALTBY MAIN COLLIERY CO.*
90 L. J. K. B. 349; 37 T. L. R. 123.

The Court of Appeal upheld the decision of the County Court Judge that the dependants of a workman, who committed suicide owing to abnormal state of mind caused by an accident in the course of his work, could recover compensation. The suicide must be the result of the accident, not of brooding over the injury received. It is not necessary, however, to prove that insanity is due to "structural" injury to the brain; insanity can be the result of the accident if the shock affects the mental condition.

In this case the suicide was due to melancholia, culminating in insanity; and there was evidence that the melancholia arose through mental shock caused by the accident and through the pain suffered, not merely through the man's brooding over the accident or its results. The suicide was therefore the result of an accident in the course of the man's employment.

B. F. M.

UNLAWFUL THREAT.—WRONGFUL CONSPIRACY BY WORKMEN.

WHITE v. *RILEY*. 89 L. J. Ch. 628; [1921] 1 Ch. 1.

The Court of Appeal, in *White* v. *Riley* [1921] 1 Ch. 1, reversing Astbury, J., in the Court below, held that the mere statement to an employer by a number of workmen that they will not work with another workman, and that if the latter be retained they will strike, does not, of itself, constitute an unlawful threat, and therefore is not of itself actionable.

The plaintiff, a member of the Workers' Union, refused to join the Curriers' Society, of which all his fellow-workers were members and one of the rules of which was that no member should belong to any other union. The defendants thereupon intimated to the employers that unless the plaintiff either left the employment or joined the society the workers would strike; in consequence, the plaintiff, although his services were indispensable, was dismissed. It was decided by the Court of Appeal that the defendants had not entered into a malicious and wrongful conspiracy to injure the plaintiff, or to intimidate the employers into dismissing him without the notice to which he was entitled. They had merely told the employers that unless the plaintiff were dismissed the workers would strike, the act in either case being perfectly lawful. Apart from these considerations, it was also held that a dispute between workmen and workmen concerning which trade union workmen shall belong to *is* connected with the employment or non-employment of a particular workman, and *is* a trade dispute within section 5, sub-section 3 of the Trades Disputes Act, 1906, and is, in the absence of threats, protected by section 3 of that Act.

Valentine v. *Hyde* [1919] 2 Ch. 129, which substantially laid down: (1) that official pressure on an employer by trade union agents may amount to illegal coercion even where there is no specific threat uttered; (2) that a dispute between two unions about membership is not a "trade dispute"; and (3) that even if a trade dispute existed, pressure of this kind is not warranted by the Act of 1906, was disapproved of in *White* v. *Riley*, and this case, together with *Hodges* v. *Webb* [1920] 2 Ch. 70, has checked the threatened "disintegration of the Trades Disputes Act."

Moreover, it is not actionable for one man on behalf of a union, or for two or more persons, by lawful means, to induce a third person to do what he may lawfully do in any case—see also *Huttley* v. *Simmons* [1898] 1 Q. B. 181, and *Allen* v. *Flood* [1898] A. C. 1.

O. E. E. W.

WORKMEN'S COMPENSATION.—SCOPE OF EMPLOYMENT.—CONTRAVENTION OF STATUTORY REGULATIONS.

MOORE & CO. v. *DONNELLY.* 90 L. J. P. C. 49; 37 T. L. R. 198.

The House of Lords held that contravention of a statutory order under the Coal Mines Act by a miner, who, as a result, suffered injury, took him outside the sphere of his employment, so as to disentitle him to compensation under the Workmen's Compensation Act, 1906. The order was that "if a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of . . . not less than an hour." A copy of this order was conspicuously posted at the pithead, together with a notice that the management would regard a breach of the provision as wilful and serious misconduct and as being outside a workman's employment, in the event of an accident resulting therefrom.

The reasons for the decisions have not been fully reported, but the Lord Chancellor expressly laid down that "on principle, no distinction could logically be drawn between a prohibition founded upon statute and one imposed by the employer to regulate the employment." At common law a mere prohibition of an act, if that act is merely a mode of doing what the servant is employed to do, does not put the act outside the scope of employment (*Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526). It is not clear whether the wilful misconduct of the workman is a defence under the statute, though it would not have excluded the employer's liability at common law; or whether the acts done in these cases were not wrongful modes of carrying out the employment, but were acts outside the scope of the employment, the prohibition being material merely as evidence of this.

B. F. M.

CONTRACT.

ARTICLES LEFT AT STATION.

GIBAUD v. *GREAT EASTERN RAILWAY CO.*
[1921] 37 T. L. R. 422.

The Court of Appeal in this case decided a question of some importance to railway passengers. A bicycle was left at a station on the Great Eastern Railway, the owner paying the usual charge of 4d. For this he received a receipt, which stated that the company would not in any way be responsible for articles over £5 in value, unless such value was declared and an extra charge paid. It also stated that the company accepted no responsibility for articles left at a station, unless they were duly registered. The bicycle was left, not in the cloakroom, but in the booking lobby, from which it disappeared.

It was held that the receipt did not constitute a contract to deposit and keep the bicycle in the cloakroom on which the plaintiff could rely. Further, that the condition printed on the receipt which exempted the company from liability was for articles "left at the station," not "left in the cloakroom."

It appears, therefore, that a person leaving an article over £5 in value at a station, must (1) register it, and (2) declare its value and pay an extra charge over and above the ordinary rates. Otherwise there is no remedy for breach of contract. But an ordinary "cloakroom" ticket does not impose a duty on the company to keep the article in the cloakroom itself (*Harris* v. *Great Western Railway Co.*, 1 Q. B. D. 515).

E. C. S. W.

RESTRAINT ON TRADE COMPETITION.

ATTWOOD v. *LAMONT*. 90 L. J. K. B. 121; [1920] 3 K. B. 571.

That the reasonableness of a covenant in restraint of trade must be construed very strictly is well exemplified in this case, which applies the law as laid down by the House of Lords in *Morris* v. *Saxelby* [1916] 1 A. C. 688.

Lamont was a tailor's cutter, employed by a large firm of drapers and hosiers at Kidderminster. The business embraced many departments, but the defendant was only employed in the tailoring branch. He covenanted on engagement not to carry on within ten miles of K. any of the several branches of the business after his service was terminated. He afterwards set up as a tailor only at W., outside the ten-mile limit, but obtained and executed orders at K.

The Divisional Court applied the "blue-pencil" test, and, while agreeing that the covenant was wider than was reasonably necessary for the protection of the plaintiffs' business, allowed the covenant to stand by striking out all restrictions, except as to tailoring.

The Court of Appeal held that a covenant of this description could not be severed, for severance is only possible where the two or more parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and are substantially equivalent to two or more separate covenants.

As regards the reasonableness of a covenant, the burden of proof lies on the party benefiting—in this case the firm—and the covenant must be reasonable, not merely from the point of view of both the parties, but also of the general public. There is no longer any doubt that a master is not entitled to protect himself from the competition *per se* of a former servant; nor can the servant be prevented from using his own skill and knowledge, which he may to a great extent have acquired during the course of his employment with the covenantee. See also *Bowler and Blake* v. *Lovegrove*, a case of an auctioneer's clerk—reported in *The Times*, February 18, 1921—from which it is clear that, if there is any real fear that the servant can or will injure his late master by misuse of his acquaintance with customers, or of his knowledge of trade secrets, or that the master's trade connexion would be unduly invaded by reason of any special opportunities the servant might have acquired while in his employment, a covenant so restricting him will not be deemed unreasonable. But a covenant with the sole object of restraining competition is unreasonable.

E. C. S. W.

CONTRACTS AGAINST PUBLIC POLICY.—"KNOCK OUT" AT AN AUCTION.—DEFENCE NOT RAISED UPON THE PLEADINGS.

RAWLINGS v. *GENERAL TRADING COMPANY.* 37 T. L. R. 252.

THE plaintiff claimed an account of profits arising out of an agreement with the defendants at a public auction of Government stores that they would keep down the price by not bidding against each other and that they would share the profits of purchases made in this way.

The Court of Appeal (Scrutton, L.J., dissenting) allowed an appeal from the decision of Shearman, J., who had held that the agreement was unlawful as contrary to public policy. This defence was not raised upon the pleadings.

Atkin, L.J., held that this agreement could only be unlawful as in restraint of trade if it were unreasonable from the point of view of the public. As this point had not been raised upon the pleadings, and as no evidence to that effect had been brought, the Court could only hold the contract unlawful if it appeared *ex facie* to be unreasonable; the Court were not entitled to make the inference from the terms of this contract.

Scrutton, L.J., dissented on the ground that the contract was unreasonable from the point of view of the public, since by such contracts they were deprived of the advantage of free competition at auctions. Moreover, the goods sold in this case were the property of the community. Though the illegality of the contract had not been pleaded, he considered that all material facts were before the Court.

It is difficult to see the force of the argument that the agreement was contrary to public policy by reason of the fact that the goods for sale were the property of the State. For it could hardly be in accordance with public policy that "knock-outs" should be illegal at auctions of Government stores, though legal at auctions of private property. The real question at issue would seem to be whether "knock-outs" are legal under any circumstances.

The decision of the Court is a further illustration of the reluctance of the Courts in modern times to decide cases according to the Judges' views of public policy, which can be dealt with by legislation. On this point, see the judgments of Gorell Barnes, P., in *Hyams* v. *Stuart-King* [1908] 2 K. B. 696, and of Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson*, L. R. 19 Eq. 462.

B. F. M.

EQUITY.

NOTICE.—PRIORITIES.

IPSWICH PERMANENT MONEY CLUB, LIM. v. *ARTHY.*
[1920] 2 Ch. 257.

W. S., the sole trustee and part beneficiary of a trust of real property subject to a trust for sale, mortgaged his reversionary interest in 1903 to A., and in 1907 to plaintiffs, without disclosing the previous mortgage to A. The reversionary interest was not sufficient to pay both. The fraud was discovered in July, 1908, and negotiations ensued between plaintiffs and H. S., the brother of the trustee, who in September, 1908, procured himself to be appointed a new trustee of the trust estate in order to deal with the situation. No agreement could be arranged; so in October, 1908, H. S. gave notice to both mortgagees of his appointment as trustee, and waited for the reversionary interest to fall into possession. Plaintiffs immediately gave formal notice of their mortgage. Notice of A.'s charge was given in 1911, when it was assigned to T.

The reversionary interest fell into possession in 1916, and plaintiffs claimed priority on the ground of their prior notice to H. S. in 1908, after his appointment as trustee.

Plaintiffs contended that after an independent person got the legal control of the property, they gave prior notice, by their formal notice in October, 1908, to H. S. after knowledge of his appointment as trustee. Relying on *In re Dallas* [1904] 2 Ch. 385, they contended that no notice to a person who may become a trustee is effectual; notice must be given after his actual appointment; therefore at the crucial date, September, 1908, H. S. had no effective knowledge of A.'s mortgage, and plaintiffs gave first notice. The defendant argued that knowledge is higher than notice, and as upon his appointment H. S. knew of A.'s mortgage, this knowledge continued to operate on his mind and, as a reasonable man, he acted upon it.

Held, that it is well established that the rule does not render it necessary for an incumbrancer to prove that he gave notice of his charge to the trustee of the fund. It is sufficient to prove that the trustee had knowledge, upon which a reasonable man would direct his conduct accordingly.

Applying the principle of Lord Cairns' judgment in *Lloyd* v. *Banks* [1868] L. R. 3 Ch. 488, the knowledge of A.'s mortgage which H. S. acquired before his appointment as trustee continued to operate on his mind after his appointment, and was such that it protected the priority of A.'s mortgage and prevented plaintiffs' notice from displacing the priority.

In re Dallas was distinguished, as in that case notice was given before the fund had actual existence and was merely an expectancy; therefore the notice in that case was ineffectual. Here the fund was always in existence, and even after it came into legal possession there was no notice which would displace the actual priority.

F. J. V.

CRIMINAL LAW.

DRUNKENNESS AS A DEFENCE TO MURDER.—MALICE AFORETHOUGHT.

DIRECTOR OF PUBLIC PROSECUTIONS v. *BEARD.*
89 L. J. K. B. 437; [1920] A. C. 479.

THE prisoner, while intoxicated, committed rape upon a young girl, and in aid of the rape pressed on her throat, with the result that the girl died of suffocation. He was convicted of murder. The Court of Criminal Appeal substituted a verdict of manslaughter, on the ground that the question whether prisoner knew that his act which caused death was dangerous should have been put to the jury. The House of Lords restored the verdict of murder.

With regard to drunkenness as a defence to a criminal charge, the House of Lords expressly decided:

(1) That insanity produced by drunkenness is a good defence, similar, as to proof and effect, to insanity produced by other causes. The insanity may be temporary.

(2) That evidence of drunkenness which renders accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration in order to determine whether or not he had this intent.

(3) That evidence of drunkenness merely establishing that the mind is so affected that restraint and will power are lessened is no defence, nor does it rebut the presumption that the natural consequences of acts are intended.

In addition it was stated *obiter*:

(4) That drunkenness rendering accused incapable of having intent to do the act—*i.e.*, not merely the specific intent requisite for the crime, but the original intent to act—is a defence.

It is not clear whether this would amount to a complete defence, or would, in a case of homicide, reduce the crime to manslaughter; on principle, it would seem that it is a complete defence, since there would be no *mens rea*. There is, however, little previous authority for this statement.

It was also held that intent to do a violent act in the course of or in the furtherance of the crime of rape, or of any felony involving violence, amounts to malice aforethought. It is apparently not necessary in this case that the act be likely to cause death. It is therefore submitted that forms of *mens rea* amounting to malice aforethought are:

(i.) Intent to do the act which causes death, together with intent to kill.

(ii.) Intent to do the act which causes death, together with intent to cause grievous bodily harm.

(iii.) Intent to do a violent act which causes death in the course or furtherance of a violent felony.

If the natural consequence of the intended act be to kill or to cause grievous bodily harm, it is in general presumed that this consequence is intended; therefore intent to do an act which is dangerous, though there be no actual intent to harm, is presumed to amount to intent to kill or

to cause grievous bodily harm. This presumption cannot be rebutted merely by evidence that the accused did not advert to the consequences of his act, but it can be rebutted by evidence that he could not reasonably have foreseen the consequences, owing to reasonable mistake of fact, &c., or owing to drunkenness.

It is to be noticed that in (i.) and (ii.) there is not only the intent to do the act, but also a specific intent as to the consequences; in (iii.) there is only an intent to do the act and to do that which amounts to a violent felony. Drunkenness, therefore, which prevents the formation of such specific intent is evidence that there is no malice aforethought, unless the case falls under (iii.), and reduces the crime to manslaughter. This is the basis of the judgment in *R.* v. *Meade* [1909] 1 K. B. 895, where the crime charged was causing death by violence with intent to cause grievous bodily harm. In *Beard's Case*, it was only necessary to prove that a violent act was committed in furtherance of the rape, in accordance with (iii.); no specific intent was necessary as in (i.) and (ii.). Drunkenness could, therefore, be no defence unless—in accordance with (4) above—it rendered accused incapable of forming intent to do the violent act or to commit rape.

B. F. M.

BIGAMY.

REX v. *THOMAS ALLSOPP WHEAT; REX* v. *MARIA STOCKS.* *The Times*, Feb. 1 and 15, 1921.

The prisoners were convicted at Derby Assizes, Wheat of bigamy and Stocks of aiding and abetting bigamy, and were sentenced to one day's imprisonment. They appealed to the Court of Criminal Appeal on the certificate of Mr. Justice Sankey. The jury had found that Wheat, in good faith and on reasonable grounds, believed that he was divorced from the bonds of his first marriage when he went through the ceremony with Stocks. Avory, J., delivering the considered judgment of the Court of five Judges, held (1) that there was no evidence for such finding; (2) that in any case a *bonâ fide* belief on reasonable grounds that accused has been divorced affords no defence in law to the charge of bigamy, though it may afford good reason for the infliction of a nominal sentence.

The absolute prohibition contained in 24 & 25 Vict. c. 100, s. 57, is modified by a proviso of three exceptions (1) where the husband or wife has been continually absent for seven years then last past and has not been known to be living within that time; (2) when the accused, at the time of the second ceremony, has been divorced from the bond of the first marriage; (3) when the former marriage of the accused has been declared void by a Court of competent jurisdiction.

(1) establishes a presumption of the death of the former spouse, which has to be rebutted by the prosecution in order to obtain a conviction. It was further held, in *R.* v. *Tolson*, 23 Q. B. D. 168, that where a person goes through a second form of marriage within this period of seven years, but under the reasonable belief that the former spouse is dead, he is entitled to acquittal.

The question in the present case was—could this doctrine of presumption be extended to include as a defence the belief on reasonable grounds that the accused was divorced at the time of the alleged offence?

The appellants relied on the *dictum* of Cave, J., in *R.* v. *Tolson*, at p. 181: "An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner was indicted an innocent act, has always been at common law a good defence —these exceptions equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

Avory, J., held that this was too widely stated, and that the Legislature could not be presumed to have intended even a reasonable belief in the existence of a legal divorce to be a defence. To infer from reliable information that an absent spouse is dead is quite a different thing from inferring the existence of a divorce. The latter, and its legality, are ascertainable with mathematical precision. The law can admit no presumption thereof, on whatever reasonable grounds. The prisoner must definitely establish it. A rule *nisi* is insufficient. So also a reasonable belief that a divorce obtained in an American State is valid in England, when in fact it is not valid, is no defence, though it may be pleaded in mitigation of the sentence—*R.* v. *Russell* [1901] A. C. 446.

It is true that in *R.* v. *Thompson*, 70 J. P. 6, the Common Serjeant appears to have followed *R.* v. *Tolson*, and extended that doctrine of presumption to include "*bonâ fide* belief that the first marriage was invalid when in fact it was not," as a defence. But there the accused was convicted and the question was not further discussed. In the present case, however, Avory, J., doubted whether such a ruling could be supported, even if it were material.

The decision establishes definitely that to succeed in a defence to a charge of bigamy under the second proviso, the burden of proving a *de facto* divorce is on the accused. The law will not accept *bonâ fide* presumption, such as has been adopted in relation to the first proviso in *R.* v. *Tolson*. The requirement of *mens rea* is satisfied by an intention to do an act contrary to the prohibitory statute.

H. E. S.

CONSTITUTIONAL LAW.

SOLDIER'S PAY.

LEAMAN v. *THE KING.*

89 L. J. K. B. 1073; [1920] 3 K. B. 663; 36 T. L. R. 835.

Can a private soldier sue the Crown for his pay? No, said Acton, J., in this case, which was brought by way of a Petition of Right.

An ex-corporal of the R.A.S.C. enlisted in Jersey, in September, 1914, on a special engagement at 6s. a day. On removal to Aldershot, he was again attested and given a pay-book, which stated his rate of pay to be 6s. a day. After twenty months he was informed that he was a time-serving soldier, with pay at the then ordinary rate of 1s. a day. He was compelled by his Commanding Officer to refund the difference which

he had been receiving between 6s. and 1s. This amounted to £120, which seems later to have been refunded to him by way of bounty.

The corporal now prayed for payment at the original rate, from the time payment was reduced until his discharge, in 1919. The Solicitor-General demurred to the petition, arguing that the relations between a soldier and the Crown were entirely at the pleasure of His Majesty, and not a matter of contract.

It was held that there was a species of contract between the soldier and the Crown, but it was of a kind which did not carry with it all those rights to enforce by process of law obligations corresponding to those which the law attaches in the ordinary course to contracts between subject and subject.

E. C. S. W.

REPORTS

OF THE

UNIVERSITY AND COLLEGE LAW SOCIETIES.

CAMBRIDGE UNIVERSITY LAW SOCIETY.

Founded January, 1901.

Michaelmas Term, 1920		*Lent Term, 1921*	
President	A. T. HARRIES (Emmanuel)	*President*	R. BRANSTON (Christ's)
Secretary	R. BRANSTON (Christ's)	*Secretary*	T. S. PEDLER (Queens')
Treasurer	Mr. H. A. HOLLOND (Trinity)	*Treasurer*	Mr. H. A. HOLLOND (Trinity)
Asst. Treasurer	T. S. PEDLER (Queens')	*Asst. Treasurer*	R. M. HUGHES (Downing)

Members, 147.

DURING the period of reconstruction which followed the Armistice the University Society obtained a fresh lease of life, and by the commencement of the Lent Term, 1920, its pre-war activities were in full swing.

J. A. Bell (Downing) was the first President to be chosen. H. W. Backhouse (Clare) was elected Secretary; Mr. H. A. Hollond (Trinity), a member of the Law Faculty, Treasurer; and T. C. Young (St. John's), Assistant Treasurer.

Professor H. D. Hazeltine, Downing Professor of the Laws of England, gave an inaugural address on "Lawyers in America."

On February 12, 1920, a mock trial took place before Dr. P. H. Winfield and a jury. The prosecution was conducted by A. Jacobson (St. John's) and Miss Llewellyn Davies (Girton). R. Branston (Christ's) and G. D. Richards (Downing) appeared for the defence.

The facts of the case were as follows: Mr. Shelley Shifting-Use, aged twenty-eight, wearing false whiskers which caused him to resemble Lord Dundreary, a well-known sportsman, went to the shop of Messrs. Pearl, Ruby & Co., jewellers, and asked to see some engagement rings. After seeing several, he chose one valued at £50, and asked Mr. Ruby if he might take it away on approval, promising to let the jeweller know the same day if he were going to buy it. Mr. Ruby, thinking Shifting-Use to be Lord Dundreary, consented to this arrangement. Shifting-Use, however, pawned the ring with Solomon Levi, a pawnbroker.

Shifting-Use was subsequently arrested, and was indicted for larceny. The defence established that the prisoner had a proclivity for practical joking, and was wearing the false whiskers as the result of a bet. The jury returned a verdict of not guilty.

On February 26 a debate took place, the motion for discussion being: "That in the opinion of this House, the present system of legal education in this country is inadequate."

F. Cope Morgan (Trinity) and G. S. Sharp (Fitzwilliam Hall) spoke in favour of the motion, while W. Welsford (Trinity) and H. V. F. Barron (Trinity) opposed. It was carried by a large majority.

On March 11 an address on "Rousseau and the Social Contract" was given by Dr. W. Blake Odgers.

The usual change of officers took place in the Michaelmas Term, 1920. A. T. Harries (Emmanuel) was elected President; R. Branston (Christ's), Secretary; Mr. H. A. Hollond (Trinity), Treasurer; and T. S. Pedler (Queens'), Assistant Treasurer.

On Thursday, November 4, the case of *R.* v. *Hasty-Temper* was tried before Mr. D. T. Oliver, M.A., LL.M. (Trinity Hall), and a jury.

Mr. E. Vinter, M.A., LL.B. (Christ's), and A. Mountain (Christ's) conducted the prosecution, and R. Branston (Christ's) and T. S. Pedler (Queens') defended. The prisoner was acquitted.

On November 18 an address was given by Lord Justice Scrutton on "The Work of the Commercial Court."[1]

On December 2 Mr. S. Garrett,[1] an ex-President of the Law Society, London, gave an address on "Solicitors' Work and Environment."

The following officers were elected for the Lent Term, 1921: R. Branston (Christ's) President, T. S. Pedler (Queens') Secretary, Mr. H. A. Hollond (Trinity) Treasurer, and R. M. Hughes (Downing) Assistant Treasurer.

On January 27 a business meeting was held, the recommendations of the Select Committee which had been appointed for the purpose of amending and revising the constitution of the Society being unanimously adopted.

On February 10 the question of the advisability of repealing the Trade Disputes Act, 1906, was debated. E. H. F. Morris (Christ's) opened the debate in favour of repealing the Act, and was supported by the ex-President, A. T. Harries. A. Henderson (Trinity Hall) and R. M. Hughes (Downing) opposed.

On February 19 the Society entertained Mr. J. F. P. Rawlinson, K.C., M.P., and six representatives of the Hardwick Society to dinner at the Bull Hotel. After the dinner a mock trial took place before Mr. Rawlinson and a jury.

The facts of the case were as follows:—

William Slippery, an undergraduate, twenty-five years of age, owes £20 to Bertie Bloodsucker, a moneylender, who is pressing him for payment. William Slippery, meeting Very Carefulcuss at the Hawks' Club, explains the matter to him, and asks him for the loan of £20. Carefulcuss says he cannot lend him £20, but he will help him to the extent of £10. Slippery, relieved at being able to send Bloodsucker something on account, sits down at once and writes a letter to Bloodsucker informing him that he is sending £10 on account. Carefulcuss, feeling rather sorry for Slippery, invites him

[1] These addresses are printed in full in this number.

to dine at the University Arms and, while they are in the taxi, Carefulcuss takes a bank-note from his pocket-book and hands it to Slippery, who puts it into the letter he has written to Bloodsucker and posts the letter in the hotel. The next day, when Slippery and his friend Archie Cadger are lunching at the Hawks' Club, Bloodsucker comes up and places a £50 note upon the table and says: "See what you sent me by mistake." Slippery replies: "Thank God for an honest man. Let me have the change." Bloodsucker gives Slippery change. Slippery does not inform Carefulcuss of the mistake but buys with the money a motor-cycle from his friend Reginald Sellall. Carefulcuss, discovering the mistake about ten days later, reports the matter to the police. Slippery is committed for trial at the Assizes and is indicted for larceny.

Mr. G. J. Paull (Hardwick Society) and Mr. W. Hereward (Hardwick Society) conducted the prosecution, and R. Branston (Christ's) and E. C. S. Wade (Caius) appeared for the defence.

The jury acquitted the prisoner.

On March 10 Professor J. H. Beale, Royall Professor of Law at Harvard University, gave an address to the Society on "The Westward Migration of Law in America."

T. S. P

CRANWORTH LAW SOCIETY OF DOWNING COLLEGE.

Founded January, 1921.

President	S. C. Coley.
Vice-President	D. H. Turner.
Secretary	R. L. Elgie.

Members, 26.

At the first meeting, on January 26, Professor Hazeltine welcomed the members of the Society at his residence, West Lodge. Mr. A. J. Berry then read a paper on "Some Scottish Judges of the Eighteenth Century."

At the second meeting, on February 4, the Secretary read a paper on "Lord Cranworth, Fellow of Downing and twice Lord Chancellor." In the words of *The Spectator*, Lord Cranworth "reached the pinnacle of the Woolsack without arousing opposition, without excitement, and without *éclat*." Professor Kenny also spoke of Lord Cranworth as an undergraduate of Trinity and of his life at the Bar.

On March 3 a joint debate was held with the Jesus College Law Society on the motion: "That irresistible impulse should be recognized as a defence in English law."

P. F. Randall (Jesus) proposed and appealed for a wider construction of the answers given in *M'Naughten's Case*. Irresistible impulse was recognized in America and on the Continent. To punish a man labouring under it was "gratuitous cruelty."

E. E. Edwards (Downing) opposed: "The law must be both certain and reasonable. Can medical evidence be regarded as sufficiently convincing on this question? Irresistible impulse would be too ready a defence for any

criminal; the law must presume a man sane until the contrary is clearly proved."

K. Gauba (Downing), speaking third, argued that English law was divorced from the researches of psychology and science. It did not administer justice.

C. Challen (Jesus), speaking fourth, predicted that our moral stability would be weakened if such a defence were allowed by the criminal law.

J. D. Fell, R. E. Seaton, and C. F. H. Hamilton also spoke. The motion was defeated by seven votes to ten.

Professor Hazeltine will address the Society at the beginning of the Easter Term, and after the tripos it is proposed to hold a Society dinner.

R. L. E.

EMMANUEL COLLEGE LAW SOCIETY.

Founded October, 1906.

President . . .	D. T. Oliver, M.A., LL.M.
Vice-President	A. T. Harries.
Secretary	D. D. G. Israel.

Members, 17.

On November 11 a debate was held, the motion being: "That a country deserves as many criminals as it has."

W. H. Cocker, L. L. Irwin, and A. T. Harries spoke for the motion; T. Swan, J. Mostyn, and D. D. G. Israel against.

On November 25 the President presided over a case on nuisance and trespass by aeroplanes, the facts of which are given in the Trinity College report.

Counsel.—For appellant, A. T. Harries and R. T. C. Jones; for respondent, D. D. G. Israel and E. V. White.

Judgment for respondent on both counts.

On February 14 the Society entertained the Caius College Law Society, when a House of Lords appeal case was heard.

On the Bench.—Dr. Winfield, Mr. Oliver, and Mr. McNair.

Counsel.—For appellants, T. Swan and W. H. Cocker; for respondents, T. Reay and N. Thayer.

The facts were as follows:—

A Colonel Bloodyer had unsuccessfully sued the respondent, General Firebrace, for maliciously and wrongfully causing his retirement from the Army, the General having, through dislike of the Colonel, suppressed one of his reports and himself sent in an adverse report on the Colonel's conduct of certain operations in the field. The Court unanimously reversed the decision of the Court of Appeal and gave judgment for Colonel Bloodyer.

On March 2 Mr. A. D. McNair (Caius) read a paper on "Shakespeare and Magna Carta," pointing out the reasons for the omission of any reference to Magna Carta in Shakespeare's *King John*.

D. D. G. I.

FITZWILLIAM HALL SOCIETY.

Revived January, 1918.

President . . . . . G. G. Sharp.
Secretary . . . . . F. J. Valentine.

Members, 16.

At the first meeting of the term, on October 28, Mr. D. T. Oliver (Trinity Hall) read a paper on "The Criminal Courts," tracing the development of each and their functions, original and appellate.

On November 11 F. J. Valentine read a paper on "Settlements," showing the historical development of the modern strict settlement and the purpose and operation of the Settled Land Acts.

Another paper was read on the same night by W. A. S. Ogden on "The Criminal Evidence Act, 1898, and its effect on the then existing law of evidence."

On November 24 Dr. Carr, of Trinity Hall, read a paper on "The Aubrey Peerage Case."

On February 2 Mr. A. D. McNair (Caius) read a paper on "Shakespeare and Magna Carta," and on February 28 Mr. D. T. Oliver read a second paper on "Civil Procedure in the High Court of Justice."

The Society has been very successful in bringing those who are reading law in touch with one another.

F. J. V.

GONVILLE AND CAIUS LAW SOCIETY.

Founded October, 1920.

President . . . . . T. Reay.
Secretary . . . . . H. M. Abrahams.

Members, 34.

The first meeting was held on October 25, when the President read a paper on "Witchcraft and Witch Trials."

On November 15 the following case was argued before Mr. A. L. Goodhart (Corpus Christi College):—

The Cambridge Prohibition Society advertised a public meeting in the Market Square on November 1. The Chief Constable, having received information that an attempt would be made to break up the meeting, posted a notice forbidding the Prohibitionists to assemble. In spite of this order the members met, and the following arrests were made: W. Jones, who was addressing the crowd, and H. Brown, who resisted the removal of a Prohibition button.

Counsel.—For Jones, A. E. Rainbow; for Brown, H. M. Abrahams; for Crown, G. P. Cammiade and R. G. Metcalfe.

The prisoners were acquitted.

On December 3 the annual dinner was held, Sir John Simon, K.C., being the guest of the evening. After the dinner Sir John addressed the Society on "The Lawyer's View of Evidence."

On January 24 Colonel J. Shakespear, C.M.G., D.S.O., gave an address on "Law and Administration among the Lushies and other Wild Tribes."

On Wednesday, February 16, the members of the Society presented the famous *Bardell* v. *Pickwick* trial in the College Hall. The production was well received, and a substantial sum was collected for charities.

The annual joint meeting with the Emmanuel Law Society took place at Emmanuel on February 14.

On February 28 the last meeting of the Lent Term was held, when E. C. S. Wade, B.A., LL.B., read a paper on "The Growth of Trade Unions and their Relation to the State."

A. E. R.

JESUS COLLEGE LAW SOCIETY.

Founded Lent Term, 1921.

President . . . C. F. H. Hamilton.
Secretary . . . . E. W. Nunn.
Members, 11.

The Society is in its infancy, this being its first term, but the meetings, though not well attended, have, on the whole, been fairly successful. Hitherto the meetings have been of an informal nature, when leading cases, such as *R.* v. *Boulton* and *Bridges* v. *Hawkesworth*, have been discussed.

A full-dress mock trial was also held in conjunction with the Newnham College Debating Society, Dr. P. H. Winfield acting as Judge.

E. W. N.

KING'S COLLEGE LAW SOCIETY.

Founded October, 1920.

President . . Rev. T. B. Scrutton.
Secretary . . . W. T. Elverston.
Members, 19.

On November 16 an appeal, *R.* v. *Smith*, was heard before Mr. A. D. McNair, the facts being as follows:—

The Cambridge Prohibition Society advertised a meeting in the Market Square, and the Chief Constable, hearing that an attempt would be made to break it up, forbade the meeting. The members met, however, and Smith, who was carrying a banner on which was written: "All liquor dealers are murderers; saloons must be destroyed," was arrested. Smith was convicted at Quarter Sessions and appealed.

Counsel.—For appellant, G. R. D. Shaw; for Crown, W. T. Elverston.

Appeal allowed.

On December 1 Mr. Reay, of Caius, read a paper on "Witchcraft and Witch Trials."

On February 3 Professor Kenny read a paper on "The Tichborne Trial."

On February 24 a House of Lords appeal case was heard. Dr. P. H. Winfield presiding. The case, *Bloodyer* v. *Firebrace*, is stated in the Emmanuel report.

Counsel.—For appellant, W. T. Elverston and C. P. Bramble; for respondent, G. R. D. Shaw and J. B. Bullock.

Appeal allowed.

On March 3 Mr. F. L. Morton read a paper to the Society.

W. T. L.

PEMBROKE COLLEGE LAW SOCIETY.

Founded February, 1920.

Michaelmas Term.		*Lent Term.*	
President	V. M. Ruston.	*President*	A. T. Young.
Vice-President	H. I. Nelson.	*Vice-President*	H. I. Nelson.
Secretary	A. T. Young.	*Secretary*	R. Lock.

Members, 35.

The first meeting of the Society was held on October 20, 1920, when Dr. Winfield read a paper on "Dickens and the Law."

On November 3 a full-dress mock trial was held, Dr. Carr, of Trinity Hall, acting as Judge. The indictment was one of murder, and witnesses were called and examined by both sides. H. I. Nelson and A. T. Young appeared for the Crown; V. M. Ruston and G. N. Grant for the prisoner. The jury returned a verdict of not guilty, and Dr. Carr discharged the prisoner.

On November 17 a debate was held on the motion: "That in the opinion of this House the action for breach of promise ought to be abolished." The motion was lost by eight votes to six.

On November 27 a debate was held with Trinity Hall. The annual dinner was held at the Lion Hotel on December 1, twenty-seven members being present.

The main feature of the Lent Term's activities was an inter-collegiate debate with the Trinity Hall Law Society in Pembroke College. The motion: "That this House welcomes the advent of women jurors" was defeated by a substantial majority.

V. M. R.

PETERHOUSE LAW SOCIETY.

Founded Lent Term, 1921.

President . . . G. W. Bedell.
Treasurer . . . C. F. Youngman.
Secretary . . . . V. J. Moore.

Members, 16.

The first meeting was held on February 2, when Professor Hazeltine read a paper on "The Education of an American Lawyer."

At the second meeting, on February 16, Professor Kenny read a paper on "The Tichborne Case."

At the last meeting, on March 2, a House of Lords appeal case, *Bloodyer* v. *Firebrace*, was heard, the facts of which are stated in the Emmanuel report.

President of Court, Dr. P. H. Winfield; for the appellant, E. E. Jenkins and H. J. Rickards; for the respondent, N. K. Barber and E. J. Carthew.

Dr. Winfield, considering the question still left open in *Frazer* v. *Balfour* and distinguishing *Dankins* v. *Rakeley*, gave judgment for the appellant.

E. J. C.

QUEENS' COLLEGE LAW SOCIETY.

Founded Michaelmas Term, 1920.

Michaelmas Term.		*Lent Term.*	
President . .	L. C. Hutchinson.	*President* . .	E. B. A. Rayner.
Secretary . .	T. S. Pedler.	*Secretary* . .	T. E. Moulsdale.

Members, 11.

Meetings are held once a fortnight, and the usual practice is to argue cases based on the more difficult leading cases in Criminal Law, Contract, and Tort. *R.* v. *Braid*, *R.* v. *Prince*, *R.* v. *Ashmill*, *British Columbia Electric Railway Co.* v. *Loach* are among some of the more interesting cases taken. At the last meeting of the term the *Mogul Steamship Co.'s Case* was hotly argued. It was contended that the defendants had by their conduct acquired an absolute monopoly, which the Court should not recognize because it was contrary to public policy.

Every member speaks at the meetings, and Judge and counsel are selected from the list of members by rotation.

N. A. C.

ST. JOHN'S COLLEGE LAW SOCIETY.

Founded October, 1920.

President . . . . E. L. V. Thomas.
Vice-President . . Dr. P. H. Winfield.
Hon. Secretary . . . W. W. Hitching.
Members, 34.

Meetings were held as follows:—

October 25.—Professor Kenny read a paper on "The Tichborne Case."

November 8.—A libel case was argued before Mr. A. D. McNair, M.A., LL.M. (Caius), the facts of which were as follows:—

In 1912 the defendant Inkslinger wrote some defamatory verses about the high price of groceries charged by the plaintiff Pompas, a grocer in Localton. He put them in a drawer and forgot about them. Pompas previously had married a lady who had been engaged to Inkslinger, and there was evidence of malice on Inkslinger's part. In 1919 the defendant sent his desk to be repaired by Chisel, a carpenter, who found the verses and gave them to Quilldriver, the editor of the *Localton Lyre*, which was printed by Caxton, a master printer.

The verses were published in 1919, and the plaintiff, who was then mayor and chairman of the Profiteering Committee, at once sued Inkslinger, Chisel, Quilldriver, and Caxton. The last two defendants each pleaded an apology under the Libel Act, 1843, and paid 40s. into Court. The jury found for the plaintiff, assessing the damages at £500, and asked the learned Judge to apportion that sum should he, after hearing further argument, give judgment for the plaintiff. It was agreed that the learned Judge should have power to draw any necessary inferences of fact.

For the plaintiff, M. D. Bhansali and S. Brooke; for defendants, W. W. Hitching, E. Booth, T. C. Young, and T. B. Cocker.

After further argument judgment was given for the plaintiff, and damages were apportioned, £300 against Inkslinger, £100 against Chisel, £48 each against Quilldriver and Caxton.

November 22.—A case was argued before Mr. D. T. Oliver, M.A., LL.M. (Trinity Hall). The facts were:—

Smith gave a dinner to some friends at an hotel in Cape Town. Brown, a guest, found a pearl in an oyster served to him. The pearl is claimed by (1) Pieters, the hotel-keeper; (2) Smith; (3) Brown. It was assumed that the principles of Roman law were applicable.

Counsel were: S. G. G. Edgar, G. D. Shaw, J. S. Snowden, and N. E. Wiggins.

Judgment entered for Brown.

February 7.—Dr. P. H. Winfield read a paper on "Dickens and the Law."

February 21.—Mr. A. L. Goodhart, M.A., LL.B. (Corpus Christi College) presided over a case the facts of which were:—

On February 6 Firebrand hired a hall from Simple to be used for lecture purposes on February 15. On February 7 Firebrand advertised that he intended to speak in favour of Communism. The Chief Constable of Cambridge forbade him to give the lecture, but, in spite of this, he sold

tickets. On the night of the 15th Firebrand arrived at the hall, but found that Simple had barred the door. He attempted to break down the door, which he damaged but could not open. In doing so he injured his hand. Action for breach of contract, with counter-claim for damage done to the door.

Counsel.—For plaintiff, E. Booth and J. H. Sutcliffe; for defendant, E. L. V. Thomas and F. W. Stallard.

Verdict for Firebrand for £100 for breach and £10 for Simple on the counter-claim.

March 7.—J. F. E. Prideux, M.R.C.S., L.R.C.P., read a paper on "Responsibility."

W. W. H.

SIDNEY SUSSEX LAW SOCIETY.

Founded Lent Term, 1921.

President . . . . C. P. Best.
Secretary . . . . C. B. Spencer.

Members, 12.

At the first meeting a criminal appeal was heard, the facts of the case being similar to those of the recent case of *R.* v. *Lincoln*. R. W. Turner and L. P. B. Coling appeared for the Crown; C. B. Bowman and R. G. Willcock for the prisoner.

Conviction of murder affirmed.

At the second meeting a paper was read by C. B. Spencer on "Fictions in Law," which was followed by much discussion, most of the members taking part.

The third meeting was to take the form of an appeal involving questions on "Sale on Approval"; this, however, had to be abandoned at the last moment.

C. B. S.

TRINITY COLLEGE LAW SOCIETY.

Founded May, 1920.

Michaelmas Term.		*Lent Term.*	
President . . .	E. Trapnell.	*President* . . .	B. F. Mendel.
Treasurer . . .	H. Barnes.	*Treasurer* . . .	W. G. Long.
Secretary . . .	B. F. Mendel.	*Secretary* . . .	H. E. Salt.

Members, 24.

At the inaugural meeting, on May 25, Mr. Justice Darling delivered an address on the conduct of a case with special reference to Tact in Court, coupled with some characteristic advice to potential barristers.

At the second meeting, on October 14, Dr. Winfield read a paper on "Dickens and the Law."

The third meeting was held on October 28 to argue an appeal case, *R.* v. *Robinson.*

The Court, Mr. H. A. Hollond, E. Trapnell, M. D. Lyon; for the appellant, A. S. Diamond; for the Crown, H. Barnes; *Amici Curiæ*, H. E. Salt, W. G. Long, G. M. Welsford, B. F. Mendel, E. Dupree.

Robinson, second officer of S.S. *Atlantic*, was indicted for the murder of a lascar sailor, whom he had shot when the latter attempted, despite a warning, to rush a boat in which Robinson was seeking to evacuate women and children from the sinking ship. The learned Judge directed the jury that the necessity, even if proved, could be no defence. Robinson appealed. Appeal allowed (M. D. Lyon dissenting).

At the fourth meeting the following motion was debated: "That this House would welcome legislation embodying the principle that in cases of homicide partial insanity arising from disease of the mind be a sufficient ground for a verdict of manslaughter." H. E. Salt and F. M. Crawshaw, for the affirmative; G. W. McL. Henderson and J. C. Macintosh, for the negative, were the principal speakers. The motion was lost by one vote.

At the fifth meeting, on November 25, the case of *Growser* v. *British Airways Co.* was heard.

The Court, Dr. Winfield, B. F. Mendel, W. I. Grantham; for appellant, W. G. Long; for respondent, E. Trapnell.

The points at issue on appeal were: (1) Whether an action of nuisance arising from the noise of aeroplanes could be sustained where the evidence showed that there were several aerodromes in the locality; (2) whether an action of trespass would lie for a mere passing through the air-space above the plaintiff's close at a height of 500 feet.

Held: (1) That an action for nuisance was sustained by the evidence; (2) that no action would lie for trespass (B. F. Mendel dissenting).

At the seventh meeting, on February 3, the case of *Steer* v. *Lyon* was heard.

The Court, B. F. Mendel, A. S. Diamond, H. E. Salt; for appellant, Mr. H. A. Hollond and W. G. Long; for respondent, Dr. P. H. Winfield and J. C. Macintosh.

The defendant had published, by means of a gramophone record and through an innocent agent, a topical song of his own composition, containing defamatory matter. The Court below held that this could only amount to slander, and was not actionable without special damage.

Held: This was libel, and appeal allowed.

On February 18, after the first annual dinner, the Society was addressed by Sir Ernest Pollock, K.C., M.P., Solicitor-General, on "The International Court of the League of Nations."[1]

H. E. S.

[1] This address is printed in its entirety in this number.

TRINITY HALL LAW SOCIETY.

Founded February, 1920.

President . D. T. Oliver, M.A., LL.M.
Secretary . . . T. C. Humphreys.
Members, 50.

On November 13 Dr. Carr read a paper on "The Case of the Macaroni Parson." On November 26 the first Society dinner was held in the Junior Common Room, among the guests being the Master and Mr. Francis Humphreys.

The last meeting of the Michaelmas Term took the form of an inter-collegiate debate with the Pembroke College Law Society, the subject being: "That in the opinion of this House the power of woman has increased and ought to be diminished." Dr. Carr and Capt. P. Fores, representing the Hall, argued for the motion. The motion was carried.

At the first meeting of the Lent Term Mr. Oliver read a paper on "Roman Law in Pliny's Letters."

On February 17 a return debate was held with the Pembroke College Law Society. The motion before the House was: "That this House welcomes the advent of women on the jury." The principal speakers for the Hall were J. D. Green and G. Laverack. A keen debate ensued, and the motion was finally defeated by a substantial majority.

T. C. H.

BOOK REVIEWS.

International Law. A Treatise. By L. Oppenheim. Vol. I, *Peace.* Third edition. Edited by Ronald F. Roxburgh. London: Longmans, Green & Co. 1920. 8vo. pp. xlii and 799. (Price 36*s.*)

By the death of Professor Oppenheim on October 7, 1919, the Cambridge Law School suffered a great loss, and the world at large was the poorer by the removal of one whose teaching since his election to the Whewell Professorship in 1908—and even before that date—had as its object "to lay down such rules and suggest such measures as may tend to diminish the evils of war, and finally to extinguish war between nations." Such is the duty laid on the occupant of the Chair founded by Dr. William Whewell; and one of the methods which Whewell Professors have adopted in the past, and which was pursued by the late Professor with a consuming devotion, was the exposition of the rules of the law of nations, with suggestions for amendments and agreement on points where advancing ethical standards, or elegance of juridical ideas, called for them, or where divergence of practice existed which might occasion disputes between States. Professor Oppenheim firmly believed that a more widely diffused knowledge of international law must make for the improvement of international relations and the consequent advance to a more peaceful condition

of the world. His teaching and his writings were imbued with an idealistic outlook on life, but "his optimism, so attractive to all, was," as the editor of this work says, "tempered by sober understanding." His creed was summed up in this sentence: "Our cause is the faith which removes mountains, for our cause is that of humanity," and in that spirit he wrote and worked, in books, in lectures, in classes, and, not least, in personal intercourse with students who sought his aid and advice, which he was ever most ready to give. But he avoided the mistake sometimes made by writers on international law, of confusing the ideal with the real; his teaching is everywhere essentially "positive" in character. He deals with the rules of international law which States recognize as being *legally* binding on them in their relations with each other, and where there are divergences in practice and no clearly defined and generally accepted rule can be stated, no attempt is made to do so. Where differences exist amongst jurists as to the scientific basis of any doctrine, they are clearly set forth and the author's view is as clearly enunciated.

The editor of this edition, who was a Whewell Scholar and a pupil of the author, has done his work well. In those portions for which he is solely responsible—namely, occurrences since the summer of 1919—he shows a carefully studied moderation of statement and a scholarly method of treatment. Most of the work was in a forward state of preparation before the author was overtaken by the illness which proved fatal. He has incorporated the changes made by the Treaties of Versailles and St. Germain, and has written a chapter of special importance on "The League of Nations" running to nearly fifty pages. In this the Covenant is submitted to a critical, but not unfriendly, examination. Professor Oppenheim had published his own views on this matter in 1919, in a volume entitled "The League of Nations and its Problems." His conclusions, as stated in the work under review, are that, whatever its defects —and these are set forth—the League has inaugurated a new epoch in the development of mankind by organizing the family of nations. The Covenant is, as the author points out, a compromise, and those who know the difficulties of bringing about such a compromise must be ready to accept it for the time being as the best thing obtainable under the prevailing circumstances and conditions. There is a final word of warning that "ultimately, the success of the League depends upon the good will of the majority of its members, and especially of the Great Powers."

A. Pearce Higgins.

The Year Books. Lectures delivered in the University of London at the request of the Faculty of Laws. By William Craddock Bolland, M.A., of Lincoln's Inn, Barrister-at-Law; late Scholar of Magdalene College, Cambridge. With an Introduction by the Right Hon. Sir Frederick Pollock, Bart. Cambridge University Press. 1921. pp. xi and 84. (Price 6*s.*)

Mr. Bolland's three lectures form an illuminating and useful handbook to the Year Books, that great and almost unbroken series of English law reports of the Middle Ages extending from 1289-90 to 1535. For many

generations these priceless repositories of the medieval common law of England were accessible to the lawyer and the historian only in ill-edited and ill-published editions. Not until our own time have any of the Year Books appeared in editions consistent with present-day standards of critical scholarship. Four scholars—Horwood. Pike, Maitland, and Bolland—have contributed more than anyone else to the rescue of the early Year Books from their sad state of neglect. Horwood's edition of Year Books of Edward I's time and Pike's edition of Year Books of Edward III's reign have appeared in the Rolls series of official publications. Maitland's and Bolland's editions of Year Books of Edward II's time have appeared in the Year Book series of the publications of the Selden Society. Fortunately Mr. Bolland is still actively engaged in the work of completing the Selden Society's series of Edward II's Year Books; and we may look forward to many another volume bearing the marks of his painstaking and accurate scholarship. But Mr. Bolland has done well to express an "urgent word" at the conclusion of his last lecture in the little volume which he has just published. "With Year Book scholarship," he says, "time is pressing. The lighted torch is now in very few hands. Are we going to do anything, is anybody going to do anything, to ensure that when perforce it falls from those few hands there shall be men properly qualified to take it up and carry it on before it dies out? It may be easier to keep it alight than to relight it." Time is indeed pressing. Cambridge and other seats of learning are doing something to interest law and history students in English medieval law and to train them in the sciences—palæography and diplomatic—so essential to the work of medieval editorship. But much more needs to be done ere we can be sure that Year Book scholarship is not soon to cease. The chief need is money—money to train and endow competent young scholars and money to publish the results of their editorial labours. The Universities and the Selden Society will do all else needful if only the money be forthcoming. A heavy responsibility rests on those who can afford to pay for Year Book scholarship and who yet fail to pay.

In his little volume Mr. Bolland has brought together many of the results of recent scholarship; and to this wealth of information the learned author has himself made valuable contributions in his introductions to Selden Society publications. He has very properly drawn upon these introductions for portions of his handbook; but he has gone far beyond the range of these introductions and has condensed the learning of all the recent Year Book editors, more particularly Maitland and Pike. In pages as entertaining as they are instructive Mr. Bolland considers the nature, purpose and contents of the Year Books, the language in which they are written, their authorship, and the printed form in which they are accessible to scholars; while he also contrasts the Year Books with the Plea Rolls.

Within the limits of this brief review special attention can be drawn to only one of the several matters with which Mr. Bolland deals. As to the authorship of the Year Books (a matter still in dispute amongst scholars), Mr. Bolland cannot quite see his way "to look upon these old books as merely students' note-books nor to allow them any official or even semi-official character." There is yet a third possible view, a view which Mr. Bolland is now inclined to hold; the view, namely, "that they were the work of professional reporters, that is, of reporters who made it, at any rate, part of the business of their lives to report cases heard in the

Courts, making those reports not in any way as officers of the Court, nor for the purposes of the Court, but merely as men supplying for a price an article for which there was a sufficient demand to make the regular production of it sufficiently lucrative" (p. 35). Mr. Bolland had elaborated this theory as far back as 1912 (see *Eyre of Kent of 6 and 7 Edward II*, vol. II, pp. xxxi—xlii, in the publications of the Selden Society); and in his present volume he gives a good summary of it (pp. 35—42). This view of the authorship of the Year Books, supported by Mr. Bolland's cogent reasoning, is one which has much to recommend it. Anyone who has looked into the early Year Books will be easily led by Mr. Bolland's arguments to regard them as commercial productions. But, as remarked by Sir Frederick Pollock in his Introduction (p. xi), "exactly when the production of such books for sale became a business, and whether it was more systematic as time went on, are questions capable of sólution only when the later Year Books are critically examined."

Roger North tells us that Serjeant Maynard "had such a relish of the old year books that he carried one in his coach to divert him in travel, and said that he chose it before any comedy." Likewise we are told by Hugh Blair Grigsby, in his *Life and Character of Littleton Waller Tazewell*, that George Wythe, the first law professor in America, the teacher of Thomas Jefferson and John Marshall, "above all early statesmen was deeply learned in the law; had traced all its doctrines to their fountain heads, delighted in the year book, from doomsday down." But those who delight in the Year Books are not confined to serjeants and professors; for we learn from Mr. Bolland's book that at one time a young lady in Massachusetts took out with her in her boat every afternoon a volume of the Selden Society Year Books, and that she was "wholly fascinated" by it. One of the many reasons why the Year Books delight and fascinate is that they picture to us the life of the times. In Mr. Bolland's words, they are "priceless storehouses of many kinds of learning." The law, the social and economic conditions, the language, the humour, the tragedy of the Middle Ages—they are all in the Year Books. Mr. Bolland's enlightening volume gives the reader an excellent introduction to this vast treasury of medieval lore. May it arouse a desire to examine this treasury at first hand.

H. D. Hazeltine.

International Law and the World War. By James Wilford Garner. Longmans, Green & Co. Two vols. pp. xviii and 524; xii and 534. (£3 12*s.* net.)

Professor Garner, of the University of Illinois, whose works on political science are well known, has written an able and a useful book. It may be felt in some quarters that it is still too near the days of the European war for anyone to sum up effectively the alterations which it has wrought in international law as hitherto understood. On the other hand, somebody must make a beginning; and it is all to the good that the earliest attempts in this direction should come from scholarly and well-read authors, as does the present book. There is a note of pathos in the fact that Professor Oppenheim, who had pre-eminently the gift of making,

or of getting others to make, the apposite utterance in the field of international law, died before Professor Garner's work increased the value of his series. It follows the lines of the ordinary treatise upon the laws of war—enemy character, intercourse with the enemy, forbidden weapons and processes of war, treatment of prisoners and wounded, blockade, the authority of Prize Courts, and the like—but the whole is commented upon by one who has made himself at home in every detail of the methods by which the war was waged, the pronouncements of belligerent and of neutral Powers, as well as the treatises of publicists. The text is provided with copious references and a list of authorities is provided at the end. These last alone make the two volumes most valuable. In the next editions—for further editions may be predicted with confidence—it is to be hoped that closer attention may be paid to proof-reading. It is surprising that Messrs. Longmans allow to pass such slips as occur for instance in the second volume on p. 4, line 10, or p. 13, line 3. The British Year Book of International Law for 1920 might, perhaps, have been put to use and quoted in the list of authorities, more particularly in respect of Sir Erle Richards' informing article upon Prize Court decisions: while, in giving an account of moderate pre-war opinion on the Declaration of London, Professor Garner may be glad to have his attention drawn to the *Quarterly Review* for April, 1911, No. 427.

Chapter XXIII, on "Blockades," furnishes an example of the author's method at its best. None the less one rises from it with old doubts unappeased. Even before the war the method of treating the law of nations deductively had worn extremely thin. In practice it had become a fact that writers merely rewrote their predecessors' books with alterations only in detail, adopting an order and arrangement in treating the subject which was fast becoming conventional. To this generalization Westlake and Hall furnished noteworthy exceptions, the former because he was free from the common English inability to see questions from the Continental jurists' point of view; the latter because he combined with the commonsense of an English barrister the courage and industry to think out problems afresh from the beginning. Now the trouble is that international law, as it has survived the war, cannot be made to square with old methods and time-honoured systems of arrangement. Take blockade alone; here, if facts are faced, what was once a single department of warfare, or a particular weapon in the hands of a belligerent, has been so transformed until for any Supreme Command the necessity is not so much to relate it to other operations as to relate other operations to it. It does not meet these facts to attempt to discriminate between so-called "legal blockades," such as the Allied blockade of German East Africa, and "blockades" in inverted commas, such as the Allied "blockade" of Germany. In such wise did military text-books attempt to apply discriminatory inverted commas to the tactics of Napoleon because he did not accommodate himself to the tactical conventions of the eighteenth century. Historians may be able to perform their usual service for lawyers by pointing out that the word "blockade" is no exception to the rule that the same technical term may have a very different meaning for different generations, and that, as it was used in a different sense by Napoleon, Lincoln, and Lord Robert Cecil, so it may undergo fresh changes of connotation in the future. Philosophers may speculate as to whether, when speaking of the employment of economic pressure upon recalcitrant States, the framers of the League of Nations may not be introducing the

world to a conception of international relations in which blockade might form a feature of relationship between sovereign States which is neither peace nor war. In a word, changing circumstances have made the use of the word "blockade" ambiguous. As with many other kindred phrases, there is a need for fresh definition, and to provide such definition students of the law of nations will be compelled to return to first principles and to do some hard thinking about them. The scope of the work under review did not permit of this, but few writers upon the subject can be so well equipped as Professor Garner is, in his own time, to do it.

GEOFFREY BUTLER.

The Book of Church Law. By the Rev. J. H. BLUNT, D.D., with a preface by LORD PHILLIMORE; revised by G. EDWARDES JONES, Barrister-at-Law, formerly Fellow of Pembroke College, Cambridge. Eleventh edition. Longmans, Green & Co. (14*s*. net.)

THIS is a very good book, and should be in the possession of every parish priest, every ecclesiastical official, and many laymen. The sub-title claims that it is "an exposition of the legal rights and duties of the parochial clergy and laity of the Church of England," and this claim is fully made out. For the first six editions Lord Phillimore was, on the legal side, responsible. The present edition, issued in this year, includes the changes made by the Welsh Church Act of 1919 and the Church of England Assembly (Powers) Act of the same year. It contains in an appendix the Canons of 1603, 1865, and 1888, the text of twelve leading ecclesiastical statutes, and a table of ecclesiastical fees. The main body of the book consists of some 400 pages of instruction of the sort indicated in the sub-title, and there are few parish priests who will not increase their knowledge with every page they read. It is safe to say that most parsons are very ill provided with definite knowledge of the special legal relations in which they stand towards their parishioners, and that no surprise need be felt when, as sometimes happens, they find that they have, in the honest intention of doing their duty, placed themselves in a false legal position. Most parish priests, reading this book, will find their hair standing up at legal perils often and carelessly braved, and will from that moment greatly mend their ways. This is most desirable: for inexactitude in the parson means uncertainty and danger for the layman. It is to be hoped, therefore (as the number of parish priests reading this review is likely not to be large, and the number of those who can afford the book still smaller), that every reader will give a copy to his own parson: a better present he could scarcely give.

But it is not only the clergy who will be interested in this book: it is just as greatly needed by the average churchwarden, whose legal position is clearly described. And the layman will find much to interest him. Most people have a very vague idea of the amount of service a parishioner may legally claim from his priest. And it is likely that most laymen will receive with surprise the information that, unless they fall within certain exempted classes, they are liable to be elected to serve as churchwardens.

But the interest is not only of this practical kind: if anyone wishes to know what dress is prescribed by the Church of England for masters of colleges, in restraint of their (apparently well-known) tendency to "newfangleness of apparel," he will find the information on p. 405. If you wish to know whose presence in church was objected to for using "a jesticulous tone and altitonant voyce, viz., squeakinge like a gelded pigg," p. 290 will supply the knowledge. This level of excitement cannot be promised throughout; but it cannot be said too strongly that this book ought to be read by all who value in any way membership in the Church, and possessed for instant reference by all her officers.

T. B. Scrutton.

A Practical Treatise on the Law relating to the Church and Clergy. By Henry William Cripps, M.A., Q.C. Seventh edition, by Aubrey Trevor Lawrence and the Hon. R. Stafford Cripps, Barristers-at-Law. London: Sweet & Maxwell, Lim. 1921. pp. xliv and 682. (Price £2 15*s.* net.)

It is now over thirty-four years since the last edition of this standard treatise was published. During this period many changes in the law have been made by legislative enactment and judicial decision. Among the statutes of first importance are the Clergy Discipline Act, 1892, the Benefices Act, 1898, the Union of Benefices Act, 1919, the Welsh Church Act, 1914, the Welsh Church (Temporalities) Act, 1919, and the Church of England Assembly (Powers) Act, 1919. Of cases dealing with ritual controversies the *Bishop of Lincoln's Case* has been, perhaps, the most important. On other subjects there have been a considerable number of cases affecting the Church and the clergy, including such cases as *Fowke* v. *Berrington* [1914] 2 Ch. 308 and *R.* v. *Bredwardine Churchwardens* [1920] 1 K. B. 47. Many judgments of Consistory Courts have also been reported since the last edition appeared.

The present edition, incorporating all of this new material, amounts to a complete revision of the work. In the process of revision the editors have made certain small changes in arrangement of subject-matter and have omitted matters no longer of first importance. At the same time they have added a useful chapter on faculties and brought the tables of cases and statutes up to date. Faithful to the original design and purpose of the work—a legal treatise which should be both a book of easy reference for the lawyer and a book of practical utility for the clergyman—the editors have proceeded on the principle that their first duty was "to enunciate rather than criticise the law." A careful perusal of the work in its new form leads one to the conclusion that the editors have succeeded in their task. Both lawyers and clergymen will find the treatise extremely useful.

Recent Parliamentary legislation has affected the scope of the treatise in two important directions. On March 31, 1920, the Church of England, so far as it extended to, and existed in, Wales and Monmouthshire, ceased to be established by law. As a result, the editors have viewed the constitution and government of the Church in Wales as outside the scope

of the treatise. The editors point out, however, that "one slender thread of legal connection" between the Church of England and the Church in Wales still exists, for Parliament has enacted that provision may be made with the consent of the Archbishop of Canterbury (approved by His Majesty in Council) for appeals from Welsh Ecclesiastical Courts to the Court of Arches (but not to the Privy Council). The Church of England Assembly (Powers) Act, 1919, the so-called "Enabling Act," has also affected the scope of the present work, in this instance in the direction of enlargement and not of curtailment. In view of the fact that the Enabling Act "seems destined to effect a profound change in the organisation of the Church and touches the rights and duties of every member of the Church, lay as well as ecclesiastical," the editors have dealt briefly with the National Assembly and its ancillary bodies (pp. 27—34). In future editions this part of the treatise will unquestionably grow to large proportions.

H. D. Hazeltine.

The Position and Rights of a Bona Fide Purchaser for Value of Goods Improperly Obtained. (Being the Yorke Prize Essay for the year 1918.) By J. Walter Jones, B.A., LL.B., of the Inner Temple, Barrister-at-Law; formerly Scholar of Emmanuel College, George Long Prizeman, Barstow Scholar. Cambridge University Press. (12*s.* 6*d.* net.)

It should be a sufficient recommendation of Mr. Walter Jones's Essay to say that it fully maintains the high standard of scholarship and research associated with the works which have gained the Yorke Prize in this University. This prize was founded by Edmund Yorke, formerly Fellow of St. Catharine's College, and, under a scheme of the Court of Chancery, is offered annually to that graduate of the University, of not more than seven years' standing from his first degree, who shall be the author of the best essay on some subject relating to the "Law of Property, its Principles and History in various Ages or Countries." It has been hitherto one of the most successful of the University prizes in inducing the production of work of a high degree of merit.

The present Essay maintains the tradition and will be found of the greatest service to students reading for Part II of the Law Tripos. We recommend especially the discussion of the term "good faith" (pp. 14—25), the historical summary of the doctrine of market overt (pp. 33—49), the analysis of the doctrine of estoppel (pp. 49—61), and the critical examination of liability for conversion (pp. 80—88). The work gives evidence throughout of great care and accuracy. We have noticed one oversight only. On p. 33 the author appears to have overlooked section 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, which protects a person purchasing in good faith from the sheriff selling goods in execution of a judgment.

D. T. Oliver.

Elements of Conveyancing with Precedents. By Henry C. Deane, Cuthbert Spurling, and James W. Clark. Sweet & Maxwell, Lim. pp. xxii and 388. Third edition. (Price 21*s.* net.)

This excellent book has gone into a well-deserved third edition. Although dealing with a very technical subject, it is readable and clear, and will be of interest even to those students of law who are not specializing in questions of real property. The precedents, which have been prepared by Mr. Clark, late Fellow of Trinity Hall, Cambridge, are well chosen and carefully annotated.

Principle of Equity. By A. M. Wilshere. Sweet & Maxwell, Lim. pp. xxvii and 584. (Price 25*s.* net.)

This book will prove of value primarily to students who are about to take the Bar examinations. The arrangement of the subject-matter is good and the style is clear. Too much emphasis has been placed, however, on immaterial points. An epitome of seventy-four pages has been included at the end of the text. It would benefit by considerable pruning, as the value of a summary varies inversely with its length.

The Law of Charitable Bequests. By Amherst D. Tyssen, D.C.L., of the Inner Temple, Barrister-at-Law. Second edition, by Claude Eustace Shebbeare, of the Inner Temple, Barrister-at-Law, and Charles Percy Sanger, of Lincoln's Inn, Barrister-at-Law. Sweet & Maxwell, Ltd. 1921. (Price £1 5*s.* net.)

The name of Mr. C. P. Sanger, sometime Fellow of Trinity College, who has collaborated with Mr. C. E. Shebbeare in producing the second edition of *Tyssen on Charitable Bequests*, is a guarantee of accuracy and depth of knowledge. These learned lawyers have together produced a book which is both useful and attractive and is a fitting companion to Mr. Sanger's editions of *Hawkins on Wills* and *Wigram on Extrinsic Evidence*, and Mr. Sanger's own book on Wills and Intestacies, all of which have been published in comparatively recent years by Messrs. Sweet & Maxwell.

We hope that we shall not be deemed ungrateful for all the good work which this book enables us to enjoy if we express our regret that it has been given to us in precisely this guise. Both on Mr. Tyssen's account and on that of his editors we should have preferred a new book. Mr. Tyssen's treatise, published in 1888, is of sufficient merit to stand permanently as a legal classic in its original form, presenting as it does the law of that date on the subject of charitable bequests, together with its historical development. There is so much condensation in the second edition and so different a presentation of the new matter that there is little left of the atmosphere of the original work.

On the other hand, we feel that the labour put into this edition entitles those responsible for it to appear as authors rather than as editors, and that if they had not shackled themselves to a predecessor the result would have gained in freshness.

The dismal circumstance of the cost of production has deprived us of a larger volume, and is of ill omen for the future of legal scholarship. We deplore the loss of some of the fruits of the erudition and acumen of the editors, for we should have welcomed more frequent expressions of their views on decisions and indications of the conclusions as to the manner in which the law should be extricated from the sorry tangle into which it has grown. The subject deserves an ampler setting.

For the purpose of warning him as to the intricacies of this branch of the law and guiding him to the right authorities the lawyer will find this volume invaluable. The dangers with which the subject abounds are well illustrated by the fact, pointed out on p. 106, that the important case of *Re Allen* [1905] 2 Ch. 400 was not cited before the House of Lords in *Houston* v. *Burns* [1918] A. C. 337, and that the decision in the latter case has made it more difficult than it was before to advise whether a gift expressed to be for public purposes is in a particular instance good or bad.

The general reader will be surprised by the provisions of the Roman Catholic Relief Act, 1829 (10 Geo. IV, c. 7), which are summarized on p. 80. After a recital to the effect that it is expedient to prohibit within the United Kingdom Jesuits and members of other religious orders, communities or societies of the Church of Rome, bound by monastic vows, section 28 enacts that every Jesuit and member of any such order, being in the United Kingdom at the time of the commencement of the Act, shall register himself within six months. Section 33 makes it a misdemeanour to admit any new member to any such religious order, and sections 34, 35 and 36 make the new member guilty of a misdemeanour, and liable to banishment and transportation. But section 37 provides that nothing in the Act shall extend to any religious order, community, or establishment of females bound by religious or monastic vows.

These provisions were from the first a dead letter. The policy of the Act was vainly invoked by counsel in *Re Smith* [1914] 1 Ch. 937. A testator had devised the residue of his real and personal estate to trustees "in trust for the society or institution known as the Franciscan Friars of Clevedon in the county of Somerset absolutely," and had declared that "the receipt of the father guardian or other proper officer for the time being of the said Franciscan Friars shall be a sufficient discharge for any payments made to them." It was argued for the heir and next-of-kin that this was a gift to an illegal society and void. Joyce, J., held that it was a gift to the individual friars composing the society or institution at the testator's death and valid as such. Charitable bequests excluded, a legatee must be either a natural person or a corporation, but a legacy to an unincorporated association is good because the Courts consider the persons of whom the society or association is composed to be the legatees, the named society or association being only a compendious designation for the aggregate of members. The fact that the Friars of Clevedon had rendered themselves liable to be convicted of a misdemeanour clearly did not incapacitate them from being beneficiaries under a will.

But it seems that the Act of 1829 has a bearing on the case, in that it prevents a society of the kind specified from being a charitable institution, whatever the purposes of its existence may be. If the

disposition in *Re Smith* had been in favour of a community of sisters, it would have taken effect as a gift to charity and not to individuals, provided that the purposes of the community were charitable.

It follows, likewise, that a gift to trustees for the maintenance of a community of monks would be void even though the purposes of the foundation were charitable. Joyce, J., hints at this on page 946, where he says that he is not prepared confidently to deny that a bequest expressly directed to be applied in maintaining Jesuits at a particular place might be void on the same principle as the legacy in what is known as the *Poachers' Case—Thrupp* v. *Collett*, 26 Beav. 125—which it was considered would operate as an encouragement to persons to commit misdemeanours in the future. In that case the bequest was to pay the fines of poachers who had been convicted at the death of the testator, or should be convicted within five years afterwards. And in *Bourne* v. *Keane* [1919] A. C., at p. 875, Lord Buckmaster expresses the opinion that if there were imposed upon legatees by the terms of a will the obligation of holding the gift for the purposes of a monastic order, the gift would be bad.

We could wish that the story of superstitious uses had been told at greater length. It is summarized on page 99. At common law masses for the dead were, of course, not illegal; dispositions of property to be devoted to procuring masses to be said or sung were recognized both by common law and by statute. As the result of the Acts of Uniformity masses became illegal, and the saying or singing of masses was actually a penal offence from 1581 to 1791. In the latter year, 31 Geo. III, c. 32, permitted religious worship according to the tenets of the Roman Catholic Church, subject to certain exceptions and precautions. The Catholic Relief Act, 1829, was a much wider measure, and the Roman Catholic Charities Act, 1832, put Roman Catholics on the same footing as Protestant Dissenters in respect to their schools and places for religious worship. Such was the state of the law when *West* v. *Shuttleworth*, 2 My. & K. 684, was decided by Sir Charles Pepys, afterwards Lord Cottenham, in 1835. In that case bequests to priests for prayers and masses were held void. This conclusion was based upon the erroneous assumption that such bequests were against the policy of the Chantries Act, 1547 (1 Edw. VI, c. 14), and were therefore void as being for superstitious uses. This decision was the starting point of a long line of cases, and was accepted as law until it was overruled by the House of Lords in *Bourne* v. *Keane* [1919] A. C. 815. Lord Wrenbury dissented, being unwilling to reverse a decision which had been acted upon for so long a period. Lord Birkenhead cogently pointed out that to adopt this view would amount to refusing to members of the Roman Catholic Church their rights under the law on the ground that other members of that church had been under a misapprehension for a long period of time as to the extent of those rights. It was indeed an anomalous situation that while the teaching of the doctrines of the Roman Catholic Church was a lawful, and even a charitable, purpose for testamentary liberality, it was unlawful to provide funds for the administration of the sacrament, which in the belief of that church is fundamental.

The editors point out on page 100, that although the saying of masses is a lawful purpose, it has not been decided in England to be a charitable purpose. The point will have to be decided if a trust is created for the

purpose of saying masses in perpetuity. In Ireland, a gift for masses has been held to be a good charitable gift.

Lord Birkenhead points out that it must not be assumed that there are now no superstitious uses; he thinks that an ingenious person could multiply instances in which even to-day dispositions connected with relics, the veneration of saints or the sustenance of miracle-producers, might be held to be invalid. In this connection, the Roman Catholic religion has the benefit of an Act of 1860, which provides that where property is held as a trust for purposes of the Roman Catholic religion, part of which are valid and part invalid, as being for superstitious uses, then so much as is held applicable to the void uses shall be applied under a scheme to be settled by the Judge for the benefit of the Roman Catholic religion.

It is not clear what would be the fate of a gift for superstitious uses connected with a religion other than Roman Catholicism.

Chapters XVIII and XIX dealing with procedure will be found particularly helpful. The cases have been classified with a view to extracting from them a principle distinguishing the right of the Crown to direct the disposition of a charitable gift under the sign-manual, from that of the Court to order the disposition. The following four rules have been deduced: 1. Where, without there being a trust, express or implied, there is a gift for charity generally, the Crown and not the Court has the disposition of the gift. 2. Where, without there being a trust, express or implied, there is a gift for a specified object of charity which fails by reason of its not existing at the death of the testator, then, if there is a general intention in favour of charity, the Crown by sign-manual, and not the Court, has the disposition of the gift, and if there is deemed no general intention in favour of charity, a gift to a specified object which does not exist at the testator's death fails. 3. Where, without there being a trust, express or implied, there is a gift to a specified object of charity which fails by reason of its coming to an end after the death of the testator, then if there is a general intention in favour of charity, the Crown has the disposition of the gift. On the other hand—4. Where there is a trust, express or implied, in favour of charity, the right of disposition is in the Court and not the Crown.

It may be worth while calling attention to the fact that in the preface to the first edition, which has not been reprinted, there is a convenient record of the standard works existing before 1888, which were consulted by Mr. Tyssen in preparing his book.

H. A. Hollond.

Real Property. By Alfred F. Topham, LL.M., of Lincoln's Inn, Barrister-at-Law, Reader in the Law of Real Property and Conveyancing to the Council of Legal Education, formerly Whewell Scholar and Chancellor's Medallist in the University of Cambridge. Third edition. Butterworth & Co., London. (Price 12*s.* 6*d.*)

The publication of the third edition of *Topham's Real Property*, was stayed for some time owing to the possibility that the Law of Property Bill might be passed, and render necessary a complete restatement of this

branch of the law. Now, however, it seems likely that, before the proposed reforms are carried into effect, a new generation of students will have recourse to Mr. Topham's help in its old familiar form, in numbers sufficient to justify the venture financially.

The book needs no advertisement; it will sell profusely, as it has sold before, just because it gives its public exactly what the latter wants. As a book of its kind, except for an occasional inaccuracy, it could not be surpassed. And it has its legitimate uses in the hands of an industrious and conscientious student. But we do deeply deplore the fact, modestly stated in the preface as a probability, that such a book should be found sufficient in itself for certain examinations. It is a regrettable fact that there should be any examination in a subject as vast as the Law of Real Property, so conducted that a student can satisfy its requirements by memorising the mass of matter tabulated in this book, without the necessity of resorting to fuller sources.

We do not share the author's belief that this book is suitable as an introduction to the study of the Law of Real Property by candidates for more advanced examinations. There is too much wealth of detail for a preliminary statement. What such a student requires as an introduction to an intricate subject, is a survey of its foundations, unencumbered by the detail of the superstructure which he will, in due course, have to surmount. Mr. Topham presents the foundations and the superstructure telescoped into one plane.

The book may be used with real profit concurrently with one of the larger text-books, sometimes for the purpose of finding a lucid explanation of a difficulty, and always for the purpose of ready reference to a succinct statement of the law. The ideal method of using it would be for the student to make his own analysis of larger works as he goes along, and to compare it with Mr. Topham's.

Some revisions have been made in this edition, notably in the accounts of the cases of *Pickersgill* v. *Grey*, on p. 192, and *Kilgour* v. *Gaddes*, on p. 256.

But there remain a few places where the statement of the law, generally because of compression, is liable to confuse.

On page 116 the statement that an estate tail descends, on the death of a tenant in tail, to the next person entitled under the entail, free from the debts of the first tenant, might be qualified by adding that an estate tail descends charged with a judgment, for the enforcement of which a writ or order has been registered, and also charged with certain Crown debts.

On page 132, in line 7, for the words "a fee simple" should be substituted the words "an estate of inheritance in possession," and the statement which follows—that the husband need not have possession of the land—is confusing in this abbreviated form. The statement that a widow entitled to dower cannot exercise the powers of a tenant for life under the Settled Land Acts, should be completed by the addition that she has powers of leasing under the Settled Estates Act, 1877.

On page 154 we suggest the deletion of the illustration to the effect that "a gift to B for 50 years and then to C in fee simple was void; for during the 50 years B had merely a term or personal estate in the land, and no one was seised," because it ignores the rule in *Boraston's Case*.

On page 168 the facts in *Re Thompson* [1906] 2 Ch. 199, are so condensed as to be misstated, and the conclusions stated are misleading as to the law.

On page 249, in the summary of the decision in *Garner* v. *Wingrove*, the reference to the fact that when the right of action accrued to G in 1891 there was no disability is confusing, because that fact is immaterial. The determining factor is that, when the right of action first accrued in 1884, there was no disability on the part of the person through whom the plaintiff is now claiming.

It is a pity that Chapter 31 on Prescription has not been re-written. A judicious selection of passages from Mr. Topham's own article on Easements and Profits in Volume II of the *Laws of England* would be a more effective summary of the confused state of the law on this subject. A student does not readily realize that even now a title to an easement or profit may be established by prescription in one of three alternative ways, prescription based on the presumption of a grant assumed to have been made before the first year of Richard I, prescription based on the presumption of a more recent lost grant, and prescription under the Prescription Act, 1832, and that in some cases it may be desirable for the claimant to base his claim alternatively on each of these three grounds.

H. A. Hollond.

The Law of Easements. By J. L. Goddard. Eighth edition. pp. xxxvii and 592. Stevens & Sons, Ltd. London. (Price 30*s.* net.)

Fifty years ago Mr. Goddard first published his book on the law of Easements. It is interesting to note that the present eighth edition has been edited by the same learned author. Surely this is something of a record in the annals of legal literature. No material changes have been made in the work itself, which has now been brought up to date by the inclusion of recently reported cases. Mr. Goddard's book still remains authoritative, and should be found in the library of every lawyer who is interested in the law of real property.

Williams' Bankruptcy Practice. By W. N. Stable, M.A. Twelfth edition. Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd., London. (Price £2 10*s.* net.)

The eleventh edition of this work was published in January, 1915, and, though following the tenth by an interval of only a few months, was necessitated by the passing of the Deeds of Arrangement Act, 1914, and the consolidating Bankruptcy Act, 1914. Since that bout of legislative activity there has been a lull, and the task of the new editor of the twelfth edition (Mr. Stable) has mainly consisted in a correct appreciation of the case-law of the period from January, 1915, to August, 1920. The position of the Married Woman continues to develop. At common law she could be made bankrupt if she were a sole trader in the City of London (by the custom of the City), or if she were blessed with a convict husband. Under the Married Women's Property Act, 1882, s. 1, sub-s. 5, every married woman carrying on a trade *separately from her husband* was liable to the bankruptcy laws in respect of her separate property as if

she were a *feme sole*; and by a section of the Bankruptcy Act, 1913, re-enacted in section 125, sub-section 1, of the consolidating Act of 1914, she is now subject to the bankruptcy laws as if she were a *feme sole* if she "carries on a trade or business, *whether separately from her husband or not.*" A group of cases decided in 1914 and 1915 have given this provision a broad construction. *Re Reynolds* [1915] 2 K. B. 186 decided that a woman trader who continues to trade after marriage can be made bankrupt after marriage on a debt incurred before marriage, while *Re Clark* [1914] 3 K. B. 1095 and *Re Allen* [1915] 1 K. B. 285 illustrate the rule that a married woman trader does not cease to be a trader, with the consequential liability to the bankruptcy laws, until all her trade or business debts have been paid (see pp. 35—6 and 404 of the 12th edition).

The position of the married woman and the survival of the reputed ownership clause (s. 38 of the Act of 1914) serve as a reminder that originally our bankruptcy laws were only devised to meet the case of traders, a bankrupt being defined by the statute of 1603 (which is not the earliest on the subject) as "a *trader* who secretes himself, or does certain other acts, tending to defraud his creditors" (Blackstone, Commentaries, II. 471). Subsequent statutes brought non-traders within the scope of the bankruptcy laws, and now at last, owing to these recent changes in the position of the Married Woman, non-traders and traders are alike liable to, and entitled to the relief granted by, the bankruptcy laws.

The recent war has left but little impression upon this part of our law. The alien enemy resident in enemy territory apparently retains his right of proving a pre-war debt, though not his right to receive a dividend during the war: *Ex p. Boussmaker* (1806) 13 Ves. 71; but he has no *locus standi* to move the Court to vary the rejection of his proof by the trustee: *Re Wilson* (1915) 84 L. J. K. B. 1893.

It would be presumptuous to praise a book which has so thoroughly established its reputation with the practitioner as this. The original and learned author (the late Lord Justice Vaughan Williams, who has died since the last edition, but whose contributions to our case-law will ever remain memorable) has left his book in capable hands. The work of noting-up the decisions of the intervening years has been satisfactorily done, and the usefulness of the book for another spell of years is assured.

A. D. McN.

Fry on the Specific Performance of Contracts. By A. G. R. Northcote, M.A. Sixth edition. Stevens & Sons, Ltd., London. (Price £2 10*s*.)

The first edition of this classic was published in 1858, and since the last edition in 1911, its learned author, the Rt. Hon. Sir Edward Fry, G.C.B., has passed away after a career which was remarkable, not only at the bar and on the bench, but for the many distinguished public services which he was able to render in legal and other matters for many years after his retirement from the Court of Appeal. The book has always been noteworthy for its combination of a deep knowledge of the historical and jurisprudential aspects of the subject with the up-to-date experience of the Chancery practitioner. Its author and successive editors have felt

compelled to deal with many matters which would more usually be sought for in a general treatise on the law of Contract, for instance, Parties to a Contract, Offer and Acceptance, the Statute of Frauds, Misrepresentation, Fraud, and Mistake; in doing so they have made welcome contributions to the exposition of the general law of Contract, particularly at the points where the influence of Equity has most affected its development.

A great many of the difficult points in the law of Contract are just as likely to arise in actions for Specific Performance as in actions for Damages, for instance, *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, a decision which the learned author does not question. Cases on the revocation of an offer are rare, and we are a little surprised not to find in the book any reference to *Cartwright* v. *Hoogstoel* (1911) 105 L. T. 628 (also a case of specific performance), where Eve, J., discussed and, as in duty bound, followed *Dickinson* v. *Dodds*.

To the practitioner the book needs no commendation; for the student who has not yet made its acquaintance we would direct particular attention to the first chapter, "The Origin and Character of the Jurisdiction," and to the chapter on "The Statute of Frauds and Part Performance," a subject which is all too lightly treated in most general treatises on the law of Contract.

The decisions falling within the scope of this work since the last edition in 1911 are numerous, and Mr. Northcote's considerable labours have resulted in the production of an edition which is in keeping with the high traditions of the book.

A. D. McN.

Palmer's Company Law. By Alfred F. Topham, LL.M., assisted by Lionel L. Cohen, M.A., and Alfred R. Taylour, B.A. Eleventh edition. Stevens & Sons, Ltd., London. (Price 25*s.* net.)

Sir Francis Palmer's Practical Handbook of Company Law "for lawyers and business men" has, from its first appearance in 1898, held the field as the most useful text-book on Company Law extant. It passed through nine editions during the distinguished author's lifetime, and the 10th edition (1916) and the present issue, come from the competent and experienced hands of Mr. Topham, whose "Principles of Company Law" has been found by students preparing for both branches of the profession, a very present help in time of trouble. The summary of "Leading Cases" (Chapter XLVIII), which has been a commendable feature of the book from the first, and which might well be amplified, is of great assistance as a guide to the main principles of company law.

D. T. O.

Sutcliffe's Company Law. Stevens & Sons, Ltd., London. pp. xxxi and 514. (Price 12*s.* 6*d.* net.)

Mr. Sutcliffe has written a book which will prove of great value both to the student who is about to take an examination and to the practising barrister. In a short compass he deals with the most important practical

questions which arise frequently in this subject. The more theoretical and less important points have been eliminated to a large extent. The arrangement of the subject-matter is excellent, and there is virtually no repetition. The chapter on "Promoters" is particularly clear and interesting.

It may be suggested that in future editions Mr. Sutcliffe should include in an Appendix a specimen Memorandum of Association and Articles of Association. Such examples would prove of value to the student who is not accustomed to office work. Some mention should also be made of the very important case of *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1916) 2 A. C. 307, which is neither cited nor discussed by the learned author.

Highmore's Stamp Laws. By C. C. Gallagher. Fourth edition. pp. lxviii and 424. Stevens & Sons, Ltd., London. (Price 15*s.* net.)

The numerous legislative changes of the last ten years, including the Finance Act, 1920, have made this new edition necessary. Mr. Gallagher, of the Inland Revenue Department, is an expert on the subject of Stamp Laws and has done his work of revision well. He has changed the original construction in only a few slight particulars, while at the same time including all the important recently reported cases. The exhaustive tables of statutes and of cases which precede the text will prove of especial value.

Benjamin on Sale. By W. C. A. Ker. 1920. Sixth edition. xlvii and 1209 pp. Sweet & Maxwell, Ltd., London. (Price £3 3*s.* net.)

The general usefulness of this book to the profession needs no emphasis, and the present edition suffers nothing by comparison with its predecessors. As far back as March, 1913, Mr. Ker was commissioned to undertake the sixth edition, but his labours were interrupted by the war, and this left a good deal of leeway to make up since the last edition of 1906. There is a slight net reduction in the size of the book, but the learned editor found it impossible to effect any marked abridgment consistently with the preservation of the author's work. We know from bitter experience how embarrassing an editor may find some portions of his author's scheme which he feels bound to adopt, merely because it is the author's. If Coke cease to reverence Littleton's text, what becomes of Littleton's text? Or—a more pertinent inquiry—what becomes of Coke's reputation? But, allowing for this, there may well be a limit to the quality of an author's work, and to the quantity of an editor's notes. And we think that this book would be none the worse for condensation of matter relating to the general law of contract, and omission of a number of cases cited at some length which illustrate that general law rather than the particular contract of sale of personal property; as an example, the chapter on "Illegal, Void, and Unenforceable Agreements" may be suggested. However, the plan of the work being what

it is, might not some reference have been made in this chapter to section 8 of the Registration of Business Names Act, 1916? Or, alternatively, it might have been included in the earlier portion on "Parties."

Nearly every relevant decision since 1906 seems to have been incorporated. We cannot trace in the Index of Cases *Meggeson* v. *Groves* [1917] 1 Ch 158 or *The Annie Johnson* [1918] P. 154. In the note on p. 49, it might have been added that *Capital and Counties Bank* v. *Warriner* was followed in *Ant. Jurgens Margarine-fabrieken* v. *Louis Dreyfus & Co.* [1914] 3 K. B. 40.

On page 646, Choke, J., is credited with a pretty free rendering of what he said in Mich. 21 Ed. IV, f. 55a, and in a footnote is given the benefit of the interpretation of a word which, according to the report, he never uttered.

In the chapter on Misrepresentation, the interesting theory is developed that innocent misrepresentation is not a separate head of the law, but is merely a breach of the law of Mistake, and that therefore no such misrepresentation can be material unless it nullify the assent of the other party. We should be glad if the law were what Mr. Ker argues that it ought to be; at present, it is impossible to regard it as settled here on the authority of the three Australasian cases cited in the book. However, as Mr. Ker suggests, the reader must judge for himself.

The recent cases on that unwelcome foundling from Scots law, sect. 32, sub-section 3 of the Sale of Goods Act, 1893, are discussed on pp. 837—842. It has been pointed out by another learned writer that there is less authority on what this sub-section does mean than there is on what it does not mean, and that "so far no one has been able to discover any vital use for it." (McNair, *Legal Effects of War*, 158).

We take no credit for pointing out the small error (persistent through all editions of *Benjamin on Sale*) of describing *New* v. *Swain* as a *nisi prius* case. The mistake was detected in a review of the last edition in L. Q. R. XXII, p. 335, and is noted in 34 R. R. 767, to which Mr. Ker refers. To expect an editor to verify the references to all the cases cited (upwards of 4,000) in a book of this magnitude is unreasonable. But it is not unreasonable to expect that some attention should be paid to a suggestion offered by the leading English legal review.

An index of the Statutes cited, if not of the various sections of the Sale of Goods Act, would be useful.

P. H. W.

Clerk and Lindsell on Torts. By W. Wyatt-Paine. 1921. Seventh edition. cxli and 955 pp. Sweet & Maxwell, Ltd., London. (Price £2 5*s.* net.)

We find *Clerk and Lindsell on Torts* of so much practical use that a fresh edition of it—the last was in 1912—is welcome. Books like this are the heavy artillery of legal literature, whose function is to prepare a position for capture and consolidation by other forces. The test of their efficiency is, "Do they quickly put a practising lawyer on his inquiry as to all the statutes and modern cases on the special point which he wishes to solve?" And they pass that test if they have thoroughly good indexes to matter which itself omits nothing really material. They satisfy that

test if they have some pretensions to scientific arrangement, fair accuracy in exposition, and a moderate sense of proportion. Here the learned editor has done his work well. In the matter of indices alone, we have a general index of nearly 150 pages, a table of some 7,000 cases, and eleven pages of an index to statutes. The scheme of the book is not beyond criticism, but it is workable, and an editor must in general cut his cloth according to his author's pattern. No critic in his senses—least of all one who has attempted any constructive work of his own—expects entire accuracy in such a large volume. It is enough if he can make suggestions that may prove helpful for the next edition.

Adopting for the moment the description of a tort on p. 1, we think that it would include the type of action in *Fraser* v. *Balfour* (1918) 87 L. J. K. B. 1116, though no reference appears to it in the Index of Cases. And one cannot easily account for the omission of *Levet* v. *Gas Light & Coke Co.* [1919] 1 Ch. 24, and *Litchfield-Speer* v. *Queen Anne's Gate Syndicate, Ltd.* [1919] 1 Ch. 407. The statement on p. 11 that "the duty of the occupant of land to keep cattle from straying is unqualified," should have been modified by a reference to p. 441, citing *Heath's Garage, Ltd.* v. *Hodges.* In the passage on Maintenance, *Neville* v. *London Express Newspaper, Ltd.*, is treated too summarily, and the paragraph about charity as a defence should have been backed by reference to *Harris* v. *Brisco*, which is mentioned on the same page, but in a different connection. The newspaper report of *McCarthy* v. *Kennedy* makes the case practically neglegible as an authority. No direct statement of the distinction between Champerty and Maintenance is traceable. Under "Malicious Prosecution," *Reynolds* v. *Kennedy* (1748) 1 Wils. 232, might have been noted on the question whether a reversal of the accused's conviction by a higher tribunal constitutes an acquittal for the purposes of suing an action for that tort. It was held there that it did not; but whether the Courts at the present day would go the length of this is another matter.

An opinion of Littleton, J., in Y.B. Mich. 9 Ed. IV. f. 35, cited in a note to p. 6 would have been more accurately rendered, "If a man *by negligence* suffer his house to burn," etc. The words italicized are omitted.

We are inclined to agree with the argument on pp. 54-55 that there is no valid reason for regarding rights of action for torts to property as assignable, and those for torts to the person or reputation as unassignable. Neither a decision of the Irish Court of Appeal eleven years ago, nor an *obiter dictum* of Park, J., eighty years before that, seems a sufficient answer to the principle that speculation of this kind in any action in tort is undesirable as tending to harry a man with needless legal expenses, quite apart from possible scandal to his reputation.

The learned editor will, we think, find that the assumption (to which reference occurs on pp. 746-747) made by section 1 of the Act of 1848 and in many cases, that an action lies against a Justice of the Peace for an act done maliciously within his jurisdiction, is well-founded; at least this appears to be so from the preamble of 7 Jac. 1 c. 5, and from *Lane* v. *Santeloe*, 1 Stra. 79, and *R.* v. *Fielding*, 2 Burr 719. But both principle and the trend of authority since the entirely inconclusive case of *Gelen* v. *Hall* (1857) make it highly doubtful whether any such action would now be held to lie.

It might have been noted in the Preface that references to all reports of any particular case are included in the Table of Cases. In the footnotes to the text, where one would usually expect citation of collateral reports (if one is so fortunate as to find an editor industrious enough—as Mr. Wyatt-Paine is—to cite collateral reports of any sort), there is often no quotation of the leading series of reports.

P. H. W.

The Finance Acts, 1894—1919, *Relating to Estate Duty and other Death Duties*. By J. Webster-Brown. Fourth edition. Stevens & Sons, Ltd., London. (Price 25*s*. net.)

Students of constitutional law read in their books that the Finance Act passed every year is concerned with the imposition and continuance of taxes for the current year to meet the expenses of government, and with the general regulation of the revenue. One of the most important and obvious ways of raising this revenue is by levying duties imposed in various ways on the estates of deceased persons. It is with the parts of Finance Acts of recent years regulating the imposition of these duties that this book deals. It starts from the Finance Act, 1894, which contained considerable legislation on the subject. Prior to 1894 there were no less than five kinds of death duty imposed by various statutes in force. This Act abolished two of these and reduced two more. To make up the revenue, it introduced another duty called Estate Duty which combined some of the characteristics of these other duties. It is now the principal duty leviable on the estates of deceased persons. The book also deals with the parts of other Finance Acts which have amended and regulated the imposition of Estate Duty and its relation to other duties. The plan of the book is to detail each Act in turn, commencing with the Act of 1894, and to take them clause by clause inserting after each clause any cases which may have been decided with reference to that portion of the statute. Chapters are appended on Settlement Estate Duty and on the effect of domicil on the imposition of Estate Duty, and the full text of all Acts (since 1894) relevant to the subject-matter is given at the end. This arrangement is clear, the citation of cases voluminous and exhaustive; and the practitioner is enabled easily to discover the law on any point to which his attention has been called, and the happy combination of statute- and case-law enables anyone approaching the subject for the first time to obtain an accurate knowledge of its rules. The printing is good, and the book as a whole is one which anyone whose work involves him in the intricacies of death duties will find extremely valuable.

J. D. G.

Powell on Evidence. By W. Blake Odgers, K.C., and Walter Blake Odgers. Tenth edition. Butterworth & Co. (Price £1 15*s*. net.)

It is now eleven years since the last publication of this work, and the present, the tenth edition, shows the care and accuracy that we have been taught to expect from the learned editors. The bulk of the book has been

cut down by judicious omissions, but nothing material is wanting; while the relevant sections of modern statutes have been noted down to the Larceny Act, 1916. The book is similarly abreast of the times in the matter of cases, *Beard's* and *Biggin's Cases*, both of 1920, being cited, the latter in three contexts. A useful and friendly feature of the footnote and case index references (it occurred also in the previous edition) is the fact that, besides the Law Reports, the pages are given where many of the cases will be found in Mr. E. Cockle's useful little book of cases in evidence. And herein is a signal proof of the care and accuracy of the editors. In the present volume *Att.-Gen.* v. *Hitchcock* has the reference "Cockle, 283." The case index in Cockle was referred to and gave the page as 287. Actually 283 was correct, and so the error which occurred in the book referred to was corrected in the book quoting. Surely this furnishes an answer to the ancient question:—

"Quis custodiet ipsos custodes?"

"Immo, Editores!"

When Dr. Blake Odgers can spare the time from his many labours, he might with great profit to the world write a brief monograph on Evidence and its Cogency for the instruction of lay controversialists on strikes and other matters which demand, and rarely receive, dispassionate consideration.

F. C.